Supreme Court, U.S.
FILED

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NO. 02-_____

IN THE

Supreme Court of the United States

KIM SHEFFIELD, DOUGLAS HARIK, KYLE STAPLES, ROXANNA ESCALANTE, NANCÉ CONTRERAS, PATRICIA GUTHRIE, RAYMOND RICHARDSON, KAREN CHAVEZ,

Petitioners,

v.

LARRY ACEVES, in his official capacity as Superintendent, FRANKLIN MCKINLEY ELEMENTARY SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF *CERTIORARI*

RECEIVED
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SUPREME COURT U.S.
POLICE DEPARTMENT

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July 2003

106 pp

QUESTIONS PRESENTED

I. Are public officials who seize agency fees from nonunion public employees in violation of "the constitutional requirements for the . . . collection of agency fees," *Chicago Teachers Local 1 v. Hudson*, 475 U.S. 292, 310 (1986), immune from liability under 42 U.S.C. § 1983?

II. If a labor union allows nonunion public employees forced to subsidize its activities to examine its accounting records, can the union dispense with *Hudson*'s requirement of financial disclosure "verifi[ed] by an independent auditor," 475 U.S. at 307 n.18?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding whose judgment is sought to be reviewed are listed below. Petitioners believe that the parties designated by an asterisk have no interest in the outcome of the petition. Because no petitioner is a corporation, no corporate disclosure statement is required under Rule 29.6.

1. Kim Sheffield;
2. Douglas Harik;
3. Kyle Staples;
4. Roxanna Escalante;
5. Nancé Contreras;
6. Patricia Guthrie;
7. Raymond Richardson;
8. Karen Chavez;
9. California Teachers Association*;
10. Larry Aceves, in his official capacity as Superintendent, Franklin McKinley Elementary School District;
11. Franklin McKinley Education Association*;
12. Richard Rigg, in his official capacity as Superintendent, South San Francisco Unified School District;
13. South San Francisco Teachers Association*;
14. Donald Ingwerson, in his official capacity as Superintendent, Los Angeles County Office of Education;
15. Los Angeles County Education Association*;
16. Peter Hartman, in his official capacity as Superintendent, Saddleback Valley Unified School District;
17. Saddleback Valley Education Association*;
18. William Wong, in his official capacity as Superintendent, Board of Education, Yuba City Unified School District;
19. Yuba City Unified Education Association*;

20. Dr. Libia Gil, in her official capacity as Superintendent, Board of Education, Chula Vista Elementary School District;
21. Chula Vista Education Association*;
22. Stan Carrizosa, in his official capacity as Superintendent, Board of Education, Dinuba Unified School District;
23. Dinuba Teachers Association;
24. Dr. George Block, in his official capacity as Superintendent, Chino Valley Unified School District; and
25. Association of Chino Teachers*.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners Douglas Harik and seven other public school teachers ("Teachers") respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The April 15, 2003 opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A ("App.") at 1a) is reported at 326 F.3d 1042. The opinion of the United States District Court for the Northern District of California dated February 23, 2001 (App. C at 36a), is unreported.

JURISDICTION

The court of appeals initially entered judgment on August 1, 2002. The Teachers filed a petition for rehearing. One defendant, Dinuba Teachers Association, filed a Petition for rehearing *en banc*. By order dated April 15, 2003, the court denied both petitions, but simultaneously withdrew its opinion and substituted a revised opinion. The time for petitioning for writ of *certiorari* runs from the later date. This petition is timely filed under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 and 1343. The court of appeals' jurisdiction was invoked pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 (West Supp. 2000), California Government Code § 3546(a) (West 2002),

and California Education Code § 45061. Their pertinent texts are respectively set forth in Appendices D at 58a, E at 59a, F at 60a, G at 61a and H at 62a.

STATEMENT OF THE CASE

This Court's decision in *Chicago Teachers Local 1 v. Hudson* mandates that nonunion public employees who must subsidize union activities as a condition of employment be provided with financial information "verifi[ed] by an independent auditor." 475 U.S. 292, 307 n.18 (1986). This case involves the Ninth Circuit's holding that a local teachers' union can disregard this requirement if it makes available to nonmembers its source accounting records.

This case also involves the Ninth Circuit's holding that public employers have no duty to refrain from enforcing, through forced payroll withholding, an illegal agency fee requirement.

I. The Facts.

This class action civil rights suit was filed by eight nonunion public school teachers. Each teacher is employed by a different California school district and represented by a different local labor union ("labor unions"). Each local labor union is affiliated with the California Teachers Association ("CTA") and the National Education Association ("NEA"). App. C ¶ 6, at 39a. The defendant school district superintendents, who are sued in their official capacities ("Superintendents" or "school districts"), have entered into collective bargaining agreements ("labor agreements") with the labor unions. The labor agreements control the terms and conditions of the Teachers' employment. *Id.* Each labor agreement contains a clause requiring nonunion teachers to subsidize the labor union by

paying an agency fee. *Id.* ¶ 14, at 43a-44a. The labor unions spend part of their revenues on collective bargaining-related activities and part on political and other activities not lawfully chargeable to objecting nonunion employees. *Id.*

Under federal law, enforcement of compulsory union subsidy requirements is accomplished through termination of employment or threat thereof. California law, however, like that of many other states authorizing public-sector forced union subsidies, requires school districts to withhold agency fees from wages paid to teachers and other public employees, even without their authorization. *Id.* ¶ 3, at 39a.

On October 15, 1999, the CTA, for itself and its affiliated labor unions, mailed to nonmembers the annual notice for the 1999-2000 school year required by *Hudson*, 475 U.S. at 306-07.[1] Such notices often are referred to as "*Hudson* notices." This Court held in *Hudson* that before nonmembers can be forced to pay agency fees, they must be provided, ***inter alia***: (a) notice of their right to object to and abstain from subsidizing union activities not lawfully chargeable to nonunion employees; and (b) financial disclosure, verified by an independent auditor, of the union's expenditures for activities that nonmembers are forced to subsidize. *Id.* at 305-10 & n.18.

This *Hudson* notice informed nonmembers that they had thirty days to (a) object to payment of the nonchargeable portion of the agency fee and (b) exercise the right to challenge the unions' calculations of chargeable expenditures before an impartial decision maker. Although the financial statement of each local union included in the *Hudson* notice was not verified by independent auditor, App. C ¶ 9, at 41a, nevertheless, in

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[1] R. 64, Declaration of Loretta Doon, Exhibit ("Ex.") C.

accordance with the labor agreements, the school districts commenced involuntary withholding of agency fees.[2]

II. Proceedings Below.

The Teachers filed their Section 1983 class action complaint on March 7, 2000. They alleged violation of their First and Fourteenth Amendment rights by the involuntary withholding of agency fees in the absence of independently verified financial disclosure of union expenditures. The complaint named as defendants both the local labor unions and the school districts which seized the agency fees from the teachers' wages.

Shortly thereafter, the Teachers filed preliminary injunction and class certification motions. With consent of the parties, the district court converted the preliminary injunction motion into a motion for summary judgment. App. C at 38a. On August 8, 2000, the court heard argument and issued a bench ruling.

A. Disposition in the district court and court of appeals.

The district court certified eight plaintiff classes comprised of nonunion bargaining unit members employed in each school district, with each plaintiff serving as a class representative to assert the claims of a plaintiff class against the corresponding defendant superintendent and local union. App. C at 48a-49a, ¶ 29.

As to the Teachers' claim of inadequate financial disclosure, the court held that, because nonunion teachers were not provided with independent verification of the union's expenses,

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[2] R. 7, Declaration of Mark J. Beutler in Support of Plaintiffs' Motion for Preliminary Injunction and Motion to Certify Class, Exs. E-L.

the taking of agency fees violated their rights under *Hudson* and its progeny. App. C ¶ 31, at 49a-50a. The district court entered judgment and awarded declaratory and injunctive relief against both the school districts and the unions. Only the unions were required to pay nominal damages. *Id.*

On appeal, the Ninth Circuit affirmed in part and reversed in part. The panel reversed the judgment against the Superintendents. The panel explained that it was bound by the Ninth Circuit's intervening decision in *Foster v. Mahdesian*, 268 F.3d 689 (9th Cir. 2001). *Foster* held that public employers have no obligation to abstain from enforcing agency fee demands where the Constitution's requirements for the collection of agency fees have not been observed. App. A at 11a-12a.

Only one union defendant (the smallest), Dinuba Teachers Association ("DTA"), appealed the district court's determination that the Constitution requires that agency fee payers receive independently verified financial disclosure of the union's expenditures for activities that they are forced to subsidize. App. A at 4a. On this issue, the Ninth Circuit initially held, on August 1, 2002, that a small local union must obtain an "independent accountant's verification" of its expenses, but need not obtain a "formal audit." *Harik v. California Teachers Ass'n*, 298 F.3d 863, 866 (9th Cir. 2002), App. B at 21a-22a. The court did not indicate how "independent verification" differs from an audit.[3]

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[3] Under California law and the laws of most states, only certified or licensed public accountants can provide verifications or audits that are distributed to external users, *see* California Business & Professional Code § 5000, *et seq.*, and only if independent. *See* R. 82, Declaration of Irving B. Ross, CPA, pp. 8-15, ¶¶ 23-41.

The Teachers petitioned the panel for rehearing to correct two largely technical matters.[4] DTA petitioned for rehearing *en banc*. Both petitions were denied. However, without explanation, the panel withdrew its opinion and issued a new opinion modifying its earlier holding to incorporate one of the arguments in DTA's petition for rehearing *en banc*.[5] The panel held that independent verification is not required where a small local union provides feepayers with "adequate accessible information" such as "bills, check stubs, canceled checks, account balances and related materials", App. A at 11a, so that nonmembers can perform for themselves the independent verification. *Id.* at 7a-11a.

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[4] Several defendants were improperly named in the caption. In addition, the Ninth Circuit's holding—that a union which collects agency fees must provide "an independent accountant's verification" of its statement of its chargeable expenses—was identical to the district court's holding. Thus, the panel should have affirmed, not reversed, the district court on this issue. The panel mistakenly believed that the district court held that audited financial statements of the union were required. The district court required only "independently verified financial disclosure." App. C at 54a-55a.

[5] By proceeding in this manner, the Teachers were afforded no opportunity to respond to the arguments in DTA's rehearing petition. Fed. R. App. P. 35(e) permits no response to a rehearing petition unless the court orders a response. Circuit Rule 35-2 provides that no rehearing will be granted without providing other parties an opportunity to respond.

ARGUMENT

I. The Ninth Circuit's Ruling That Public Employers Are Not Liable for Enforcing Illegal Agency Fee Demands Conflicts with Decisions of Other Circuits and This Court.

A. The conflict among the circuits.

The panel below reversed the district court's holding that public employers are jointly liable with unions for violating nonunion employees' constitutional rights. The sole basis for the panel's decision was the Ninth Circuit's intervening decision in *Foster*, which under circuit rule was binding on subsequent panels. *Foster* held that public employers have no legal duty to abstain from taking money from feepayers for a union where the feepayers' rights under *Hudson* are not observed. 268 F.3d at 694. Except for the Ninth Circuit, all other courts have rejected the rule set forth in *Foster*, including four federal courts of appeals.

1. The Sixth Circuit

In *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), the Sixth Circuit held that, where *Hudson*'s notice and audit requirements have not been met, the Constitution requires public employers to abstain from the illegal taking of nonunion employees' money:

> A careful review of the requirements of *Hudson*, therefore, yields the conclusion that . . . . no union or *employer* may take *any action* to enforce a non-union member's duty to pay any dues, whether through *a deduction from wages* or payment from wages already paid, until a plan with procedures meeting the commands of *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)] and

> *Hudson* is established and operating. Specifically, all non-members must receive an adequate accounting, certified by an independent auditor . . . .

824 F.2d at 1504 (emphasis added).

The *Foster* court strained to minimize the conflict between its decision and *Tierney* by interpreting *Tierney*'s holding to apply only where "a *plan* comporting with *Hudson* [is not] in place." *Foster*, 268 F.2d at 694. *Tierney* was not so limited. *Tierney* held that an employer cannot lawfully make deductions until such a plan "is . . . operating" ***and*** "all non-members . . . receive an adequate accounting, certified by an independent auditor." 824 F.2d at 1504. *Foster* is thus based on a misreading of *Tierney*.[6]

Other Sixth Circuit decisions similarly conflict with the decision of the panel below. In *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), the Sixth Circuit held that a clause in a labor agreement indemnifying a public employer from liability for enforcement of an agency fee requirement was contrary to public policy, because it eliminated government's incentive to abstain from collecting agency fees where nonmem-

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[6] Moreover, the constitutional distinction suggested by *Foster*, *i.e.*, that public employers are liable only where a union fails to adopt a constitutional plan, but not where a union fails to implement adequately a facially satisfactory plan, was abandoned by the panel in this case. The financial disclosure that the panel held to be inadequate was issued pursuant to a constitutionally-inadequate financial disclosure protocol promulgated by the CTA and adopted by almost all CTA-affiliated unions. App. C ¶ 10, at 41a-42a. The CTA plan requires verification by an independent auditor only where the local union has annual expenditures exceeding $100,000.

bers' constitutional rights under *Hudson* are violated. *Id.* at 1538.

Although indemnification is not at issue here, *Weaver*'s ruling explicitly rests upon a holding that public employers are jointly liable with unions for violation of nonunion employees' rights under *Hudson*. *See* 970 F.2d at 1538 ("a public employer ha[s] duties separate and apart from those of the union. Both parties to a fair share agreement must be held accountable for their responsibility to see that *Hudson*'s commands are followed."). The Sixth Circuit reached a similar conclusion in *Cramer v. Matish*, 924 F.2d 1057, No. 88-00306, 1990 WL 169640 at *4 (6th Cir. Nov 2, 1990) ("Under *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid.") (*quoted in Weaver*, 970 F.2d at 1537).

2. The Seventh Circuit

The panel's decision directly conflicts with the Seventh Circuit's decision in *Hudson v. Chicago Teachers Local 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986). As in this case, *Hudson* involved the involuntary withholding of agency fees; no other action was taken against the fee payers. In discussing the public employer's Section 1983 liability for collection of agency fees absent compliance with the procedural protections required by the Constitution, the Seventh Circuit held: "the *public employer* must establish a procedure that will make reasonably sure that the wages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." 743 F.2d at 1194 (emphasis added).

In *Hudson*, it was not the public employer, but rather the union, that argued that the Constitution imposed no obligations on it. The Seventh Circuit rejected this argument:

> It is true that the union is a private entity; that the [school] Board, in withholding an "agency fee" from its employees' wages, was acting as the union's agent; and that section 1983 only reaches action under color of state law. But when a public employer assists a union in coercing public employees to finance political activities, that is state action; and when a private entity such as a union acts in concert with a public agency to deprive people of their federal constitutional rights, it is liable under section 1983 ***along with the agency***.

743 F.2d at 1191 (emphasis added).

The panel's decision is also contrary to the Seventh Circuit's decision in *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989). *Gilpin* was a suit against a union and several public employers alleging violation of *Hudson*'s requirements. In discussing the basis for liability against the public employer, the Seventh Circuit reasoned that

> [I]f the union . . . makes the nonmembers pay . . . an agency fee that exceeds the collective bargaining costs fairly chargeable to nonmembers, the union—***and the employer***—can get into legal trouble. If the collective bargaining agreement is with a ***public*** employer (state or local) that deducts the union's agency fee from its employees' wages . . . . the First Amendment has been held to require the ***public employer*** and the union to establish efficacious procedures, including notice and right to a hearing, for determining how much of the union's proposed agency fee is proper.

875 F.2d at 1312 (emphasis added).

3. The Third Circuit

The Third Circuit also interprets *Hudson* to require public employers to ensure that employees' constitutional rights are not violated by the employer's enforcement of an agency fee requirement. Like this case, *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), was a suit to enjoin the collection of agency fees where the union failed to provide audited financial disclosure. In holding that public employers are liable for collecting agency fees where the procedural protections of *Hudson* have not been implemented, the Third Circuit stated:

> The [public employer] may be called upon to defend the deduction of fees and may be enjoined from imposing the fair share fees on nonmembers when it is determined that the exclusive representative has not complied with the constitutional requirements [for their collection].

Id. at 411. The court also said:

> As we read [*Tierney*, *Dean v. TWA*, 924 F.2d 805 (9th Cir. 1991),] and *Hudson*, the employer and the union must have a constitutional procedure in place ***before*** deducting fees. . . . [T]he requirement that a constitutional procedure be in place before fair share fees are collected simply means that if a court subsequently determines that the procedures are constitutionally inadequate, both the public employer and the [union] shall be accountable for the constitutional violation.

Id. at 405-06 (emphasis in original).

4. The Tenth Circuit

The Tenth Circuit also holds that public employers are obligated under *Hudson* to abstain from enforcing an illegal agency fee demand. In *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002), the public employer collected compulsory agency fees where the union's *Hudson* notice did not include an auditor's report. The Tenth Circuit held that failure to provide the auditor's report violated the nonunion employees' rights under *Hudson*. 299 F.3d at 1192-94. The court further held that the contract provision indemnifying the public employer from liability for enforcement of the agency shop requirement was contrary to public policy, because it removed the employer's incentive to observe its constitutional duties. The Tenth Circuit reasoned that "if the Supreme Court had only been concerned with the union's ability to carry out the *Hudson* requirements, it would not have placed the burden on both parties." *Id.* at 1198 (2-1 decision).[7] The Tenth Circuit affirmed the district court's judgment against the public employer.

B. The panel decision is directly contrary to this court's decision in *Hudson*.

Foster, which controlled the panel in this case, held that although *Hudson* imposes a legal obligation on public employers, that obligation does not apply to involuntary withholding. *Foster*, 268 F.3d at 694. If that were true, *Hudson* would have gone the other way. This Court's holding in *Hudson* is based on

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[7] In *Wessel*, although Judge McKay dissented from the holding on indemnification, he acknowledged that *Hudson* imposes a duty on public employers to adopt procedures that comply with *Hudson*. 299 F.3d at 1199-1200 (McKay, J., dissenting in part).

a similar automatic union fee deduction statute.[8] In *Hudson*, it was the school board's deduction of agency fees and its adherence to the union's demand to commence fee withholdings that was the basis for the board's liability:

> In October 1982, the Union formally requested the Board to begin making deductions . . . . The Board accepted the Union's . . . determination [that its expenditures were 95% chargeable] without questioning its method of calculation and without asking to review any of the records supporting it. The Board began to deduct the fee from the paychecks of nonmembers in December 1982. The Board did not provide the nonmembers with any explanation of the calculation, or of the Union's procedures.

475 U.S. at 296.

Hudson was a suit against a teachers' union and corresponding public employer. *Id.* at 297. In delineating the procedural safeguards that the Constitution requires for the collection of agency fees, this Court held: "Since the agency shop itself is 'a significant impingement on First Amendment rights,' the ***government and union*** have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id.* 475 U.S. at 307 n.20 (emphasis added) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). In *Hudson*, this Court set forth the constitutional prerequisites for the "collection" of agency fees. 475 U.S. at 310. In virtually all situations, it is the employer,

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[8] *See* 475 U.S. at 295 n.1 (state statute provided that fair share fee "'shall be deducted by the [school] board from the earnings of the non-member employees and paid to the representative organization'" (statutory citation omitted)).

not the union, which collects the agency fee. Any constitutional precondition to the collection of agency fees would invariably apply to the employer.

Foster dismissed this aspect of the *Hudson* Court's ruling by limiting its application to the employer's duty to make available an impartial decisionmaker before whom the amount of the fee could be challenged. No language in *Hudson* leads to that conclusion. To the contrary, the *Hudson* Court uses the plural—"procedures"— suggesting that the "responsibility" applies to all procedural safeguards required by *Hudson*. Moreover, earlier in its analysis, in discussing the need for procedural safeguards, the Court made clear that those safeguards are directed primarily against the public employer:

> Procedural safeguards are necessary . . . . [because] the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the *governmental action* on his interests and to assert a meritorious First Amendment claim.

475 U.S. at 302-03 (emphasis added). Of the procedural safeguards *Hudson* requires, the one most directed toward enabling the fee payer to "identify the impact" of the agency shop upon his or her First Amendment interests is the financial disclosure in the *Hudson* notice. This information is necessary to protect the fee payer from "governmental action"—*i.e.*, the unlawful taking of fees from his or her wages by the public employer.

Foster acknowledged that *Hudson* imposes a legal duty on public employers to ensure the adequacy of the agency fee collection procedures, but held that this duty does not apply to the collection of fees. 268 F.3d at 694 & n.8. That is pure

sophistry. Where an agency fee agreement is enforced only by the deduction of agency fees without the nonmember's authorization, as in this case and in *Hudson*, the only action an employer can take that would trigger its legal duty under *Hudson* is the deduction of the fees.[9] In other words, were *Foster* correct, employers would have no duty under *Hudson* in California and other states that permit or require fee seizures. If an employer's constitutional duty does not arise when it takes an employee's money, it cannot as a practical matter ever arise.[10]

Moreover, because the unions, unlike the school districts, are non-governmental actors, there is no intellectually tenable way to hold the unions, but not the school districts, liable for a constitutional violation arising out of joint participation in the

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[9] *See Hudson v. Chicago Teachers Local 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986) (withholding of agency fee triggers public employer's constitutional obligations); *Hohe v. Casey*, 956 F.2d 399, 405 (3d Cir. 1992) (same).

[10] When the agency fee agreements at issue in this case were negotiated, California Education Code § 45061 guaranteed the right of teachers to pay the agency fee directly to the union and bypass involuntary withholding. If a teacher refused to pay, the employer would commence involuntary withholding. On January 1, 2001, amendments to California Government Code § 3546(a) became effective which require school districts to involuntarily withhold agency fees even if there is no agency fee provision in the labor agreement. Both before and after this enactment, agency fee enforcement was accomplished only through involuntary withholding. Thus, the situation could never arise where a public employer would threaten or commence involuntary termination proceedings for failure to pay an agency fee.

enforcement of an agency fee agreement.[11] As in *Hudson*, the sole basis on which the unions here are state actors subject to Section 1983 and constitutional constraints is their joint participation with the government employer in enforcing the agency fee obligation. As a consequence of its adoption of *Foster*'s holding, the panel in this case, like that in *Foster*, reached the anomalous conclusion that, even though unlawful government action occurred, the government nonetheless did nothing unlawful and thus was not liable.

The panel's aberrant decision cannot logically be reconciled with this Court's decision in *Hudson*.

C. The issue of employer liability for forced deduction of agency fees absent *Hudson* compliance has great significance.

The "agency shop itself is 'a significant impingement on First Amendment rights.'" *Hudson*, 475 U.S. at 307 n.20 (quoting *Ellis*, 466 U.S. at 455). Consequently, in *Hudson* the "importance of the case . . . led [the Court] to grant certiorari" to determine what the duties of public employers and unions are in collecting agency fees. 475 U.S. at 300. This case is equally important.

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[11] *See, e.g., Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1430, 1449 (N.D. Ohio 1987) ("To permit a public employer to escape any duty in the implementation of the [agency fee] plan, would impose a governmental standard of conduct on a purely private entity"); *Mitchell v. Los Angeles Unified Sch. Dist.*, 739 F. Supp. 511, 516 (C.D. Cal. 1990) ("[I]t is the public employer's involvement in the agreement authorizing the seizure of the agency fees that gives rise to a claim by plaintiffs for deprivation of federally secured constitutional rights.").

Many states with public–sector agency shop permit involuntary withholding from payroll to enforce union subsidy obligations.[12] Involuntary withholding of union fees appears to be the trend. California recently enacted or amended various public–sector labor statutes (each statute applicable to different public-sector employees) to require employers to withhold agency fees even where a labor agreement contains no compulsory union fee clause.[13] Thus, this case presents an issue that affects the First Amendment rights of many public employees.

Moreover, the Court should grant certiorari because, if not reversed, the decision of the panel below will practically extinguish for many nonunion employees the constitutional rights recognized in *Hudson*. As noted by the Seventh Circuit:

> [T]he amount of monthly deductions potentially at issue in cases such as this is small for each [dissenting] employee. As a result, most violations of the First Amendment caused

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[12] *See* Cal. Gov't Code § 3546(a) (West 2002); Conn. Gen. Stat. Ann. § 10-153(c) (West 2002); Del. Code Ann. tit. 14, § 4019(b) (2001); D.C. Code Ann. § 1-617.07 (2001); Haw. Rev. Stat. Ann. § 89-4(a) (LexisNexis 2001); 115 Ill. Comp. Stat. Ann. 5/11 (West 2002); Mich. Comp. Laws Ann. ch. 408.477, § 7(1) (West 2001); Minn. Stat. Ann. § 179A.06(3) (West 2001); N.J. Stat. Ann. § 34:13A-5.6 (West 2002); N.Y. Civ. Serv. Law § 201(2)(b) (McKinney 2002); Ohio Rev. Code Ann. § 4117.09(C) (2001); Or. Rev. Stat § 243.672(1)(c) (1999); 43 Pa. Cons. Stat. Ann. § 1102.4(a) (West 2002); Wash. Rev. Code Ann. § 41.59.060(2) (West 2001); and Wis. Stat. Ann. § 111.70(f) (West 2001).

[13] *See, e.g.*, Cal. Gov't Code § 3508.5(b) (affecting city, county, and municipal employees); Cal. Gov't Code § 3546(a) (affecting public school employees); Cal. Gov't Code § 3583.5 (affecting university employees); Cal. Gov't Code § 3515.7(b) (affecting state employees).

> by union-security clauses or union-shop clauses . . . would go unremedied—maybe even undetected—if *the employer* had no duty to establish workable procedures for protecting dissenters' rights.

743 F.2d at 1192 (emphasis added).

The decision of the panel below frustrates an essential deterrent to a union's disregard of nonunion employees' rights.

II. In Holding That Small Local Unions Can Disregard *Hudson*'s Requirements If They Supply Nonmembers with Source Accounting Records, the Decision Below Directly Conflicts with *Hudson*, Another Circuit, and the Highest Court of a State.

A. The panel decision below conflicts with this Court's decision in *Hudson*.

Labor unions have been unrelenting in their efforts to resist this Court's ruling in *Hudson* that public-sector unions provide "verification by an independent auditor" of the expenditures for those activities that they force nonmembers to subsidize. 475 U.S. at 307 n.18. Various substitutes for compliance with *Hudson*'s mandate that unions have unsuccessfully attempted include: (a) unaudited financial disclosure,[14] (b) financial statements verified by union officials,[15] (c) the "local union

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[14] *E.g., Prescott v. County of El Dorado*, 177 F.3d 1102, 1112 (9th Cir. 1999); *Foster v. Mahdesian*, 268 F.3d 689, 692 n.7 (9th Cir. 2001).

[15] *E.g., Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1473, 1480 (W.D. Mich. 1988); *Wareham Educ. Ass'n v. Labor Relations Comm'n*, 713 N.E.2d 363, 364-65, 368 (Mass. 1999).

presumption,"[16] and (d) empirical evidence supporting the local union presumption.[17] In First Amendment cases, (*i.e.* public sector and Railway Labor Act ("RLA") cases) the federal courts have rejected all of these attempts. Numerous cases involved small local unions,[18] many of which are NEA-affiliated.

The Ninth Circuit has now accepted the latest union alternative to *Hudson* compliance—"verification by nonunion feepayer"—as a substitute for "verification by independent auditor." This option was specifically rejected by this Court in *Hudson*. In *Hudson*, the defendant local teachers union invited Ms. Hudson "to make an appointment for an 'informational conference' at the Union's office, at which she could review the Union's financial records." 475 U.S. at 297. This Court nonetheless required that the union's chargeable expenditures be

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[16] *E.g.*, *Hohe*, 956 F.2d at 410-11; *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431-32 (6th Cir. 1990).

[17] *E.g., Cramer v. Matish*, 924 F.2d 1057 (Table), 1990 WL 169640 at *3-*4 (6th Cir. Nov. 2, 1990) (unpublished decision).

[18] *E.g., Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 730-31 (7th Cir. 1995) (local union's expenditures required to be verified by an independent auditor); *Masiello v. U.S. Airways, Inc.*, 113 F. Supp. 2d 870, 876-77 (W.D.N.C. 2000) (RLA case involving local union's financial disclosure); *Lucid v. City & County of San Francisco*, 774 F. Supp. 1234, 1236 (N.D. Cal. 1991) (local audit required); *Mitchell v. Los Angeles Unified Sch. Dist.*, 739 F. Supp. 511, 514-15 & n.7, 516 (C.D. Cal. 1990) (independent verification requirement applies to local union's statement of chargeable and nonchargeable expenditures), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986) (same); *McGlumphy v. Fraternal Order of Police*, 633 F. Supp. 1074, 1082 (N.D. Ohio 1986) (450-member local union required to employ an independent auditor).

verified by independent auditor because "requiring [nonmembers] to object in order to receive information does not adequately protect" their rights. *Id.* at 306 (dash omitted).

The Ninth Circuit's decision in this case is contrary to *Hudson* because the Ninth Circuit allows unions to press nonmembers into serving as their auditors. Thus, the decision below impermissibly "shift[s] the burden of expense verification from the union to the nonmember." *Otto v. Pennsylvania State Educ. Ass'n*, 330 F.3d 125, 131 (3d Cir. 2003). In *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977), this Court held that it was impermissible to require teachers to specify which expenditures of the local teachers union they found objectionable as a precondition to challenging the agency fee. To do so, this Court reasoned, would impermissibly place on the nonmember "the considerable burden" of monitoring the union's expenses. *Hudson* echoed this sentiment: "'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.'" 475 U.S. at 306, quoting *Abood*, 431 U.S. at 239-40, n.40; *Railway Clerk v. Allen*, 373 U.S. 113, 122 (1963). *Hudson* explicitly held that the "nonmember's 'burden' is *simply* the obligation to make his objection." 475 U.S. at 306 n.16 (emphasis added). In short, *Hudson*'s disclosure requirements must be "accomplished without requiring or allowing the nonmembers to become the union's auditors." *Jibson v. Michigan Educ. Ass'n*, 719 F. Supp. 603, 609 (W.D. Mich. 1989); *see also Lucid v. City & County of San Francisco*, 136 L.R.R.M. (BNA) 2877, 2880, 1991 WL 157697, at *4 (N.D. Cal. 1991) ("it is the Union's burden to assemble an adequate audited statement, not [the nonmembers'].").

Hudson's placement of the burden of verification on the union is necessary as a practical matter. A school teacher lacks the training and expertise to verify a union's finances. If, as the unions' accounting expert contends, a trained CPA requires thirty-three (33) hours annually to perform the procedures necessary to obtain reasonable assurance that a local union's financial statements are free from material misstatement,[19] it is unlikely that a school teacher could complete the work in less time. School teachers—untrained in auditing, with no access to union employees, and who cannot expect union cooperation or demand satisfactory explanations—would require a significantly greater time to obtain the same level of assurance as a trained and experienced external auditor.[20] Each nonunion teacher, who has only $85 at stake,[21] would have to commit approximately one full week—full time—during a 30-day period, to determine whether the union's forced subsidy of its agenda was based on reliable information. Such a policy can only be "calculated to discourage meaningful objections to union activity." *Damiano v. Matish*, 830 F.2d 1363, 1372 (6th Cir. 1987).

The Ninth Circuit simply misstated *Hudson*'s rule. *Hudson* does not merely require unions to provide "reasonable opportunity for meaningful verification," nor does it require "adequate accessible information using an auditor verifiable methodology." App. A at 11a. *Hudson* requires "verification by

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[19] *See* R. 65, Declaration of Nicholas Ross, Ex. B.

[20] *See* R. 82, Declaration of Irving B. Ross, CPA, p. 17.

[21] Calculated by multiplying union dues of $125 (*see* R. 59, Declaration of Stephanie Minkin, p. 2), by the chargeable percentage of 68.1%. *See* App. A at 13a.

an independent auditor." 475 U.S. at 307 n.18; *see also id.* at 310 (contemplating "a certified public accountant's verified breakdown"). The Ninth Circuit simply read the word "auditor" out of the rule. At bottom, the panel's decision rests upon the premise that this Court did not mean what it plainly said in *Hudson*.

B. The conflict with other courts.

The panel decision directly conflicts with decisions from the Third Circuit and Massachusetts' highest court.

1. The Third Circuit

The panel decision is directly contrary to the Third Circuit's decision in *Otto v. Pennsylvania State Education Association*, 330 F.3d 125 (3d Cir. 2003). *Otto* is identical to this case in both fact and legal arguments presented. In *Otto*, the NEA-affiliated local union's financial sheet was attested to by a local union official. *See Otto v. Pennsylvania State Educ. Ass'n*, 161 L.R.R.M. (BNA) 2036, 2038, ¶¶ 6, 9 (M.D. Pa. 1999). The local union's portion of each nonmember's annual fee was $45, and the local union's expenditures for the relevant fiscal years were approximately $22,000. *Id.* ¶¶ 3, 4, at 2037. As here, the unions belatedly offered to permit fee payers to inspect the union's financial records as a substitute for complying with *Hudson*'s independent verification requirement. *Id.* ¶ 11, at 2038. The union argued that its finances were so simplistic that nonmembers could obtain "'sufficient information' by examining [the union's] documents themselves," and that requiring an audit would be unduly burdensome. *Otto*, 330 F.3d at 131 (citation omitted).

Rejecting these arguments, the Third Circuit held that *Hudson* cannot be reconciled with the union's position. *Id.* at

130-35. The court reasoned that *Hudson* implied no intent to make the audit requirement depend on the size or economic wherewithal of the reporting union. The Third Circuit explicitly rejected the holding and underlying reasoning adopted by the panel in this case. *Id.* at 131-32. The Third Circuit reasoned that, by allowing unions to escape *Hudson*'s requirement of "verification by an independent auditor" by providing feepayers with underlying accounting records, the Ninth Circuit was impermissibly shifting the burden of expense verification from the union to the nonmember. *Id.* at 131. The court concluded that "local unions, regardless of their size, are required to obtain audits of their financial statements" before they may force nonmembers to subsidize their activities. *Id.* at 134.

This case is indistinguishable from *Otto*. Indeed, the attorney for the union in this case (who also represents the NEA-affiliated union in *Otto*) filed a petition for rehearing in *Otto* in which he stated: "*Harik* . . . is in direct conflict with the panel's holding in [*Otto*]." Pet. of Appellant Shaler Area Educ. Ass'n for Reh'g or Reh'g *En Banc*, Nos. 01-3858 & 01-4110, at 1-2 (3d Cir. Apr. 17, 2003) (excerpts appended at App. I at 63a-65a). That conclusion is restated elsewhere in the *Otto* union's petition: "the holdings of the Ninth Circuit and th[e Third Circuit] are now squarely in conflict, ... [T]he panel's decision thus squarely conflicts with the Ninth Circuit's resolution of precisely the same issue on substantially the same facts . . . ." *Id.* at 7, App. I at 65a.

2. Massachusetts Supreme Judicial Court

Wareham Education Association v. Labor Relations Commission, 713 N.E.2d 363 (Mass. 1999), is also directly contrary. *Wareham*, like this case, involved NEA-affiliated local teachers' unions with gross annual revenues ranging between

$9,400 and $29,000. *Id.* at 365. In no case did the annual fees sought from the nonmembers exceed $45. *Id.* The local teachers' unions argued that they should be excused from the *Hudson*'s audit requirement because the cost of an audit would make it impractical to collect the agency fee. *See id.* at 365-67. Fee payers were "entitled, upon request, either to obtain from the local [union] a list of all expenditures or to examine the Local's [union's] financial receipts and record of expenses at a time convenient to [the parties]." [22] As in this case, the union defendants argued that the local unions' finances were so simplistic that nonmembers could verify the union's information themselves. Brief of the Plaintiffs-Appellants, Wareham Educ. Ass'n, pp. 21-23, *Wareham Educ. Ass'n v. Labor Relations Comm'n*, No. 99-P-101 (Mass. App. filed Mar. 25, 1999).

The Supreme Judicial Court of Massachusetts unanimously rejected the argument that something other than audited financial statements would satisfy *Hudson*'s verification requirement. In so ruling, the court stated:

> We see no basis for modifying the United States Supreme Court's express requirement that a union must accompany any demand for agency fees with an independently audited verification of its major expenses. Succinctly put, there is no exception to *Hudson*'s audit requirement for small local union affiliates.

Wareham, 713 N.E.2d at 368 (citation omitted).

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[22] This fact is found in the decision of the Massachusetts Labor Relations Commission, *In re Wareham Education Association*, 24 MLC 23, 24 (1997). *See also id.* at 23-26, 29.

CONCLUSION

Before the decision below, unions had fully exhausted their strategems for resisting *Hudson*, and the federal judiciary, in a long line of cases, had put to death the idea that this Court did not mean what it said about verification in *Hudson*.[23] The Ninth Circuit has now breathed new life into that effort to resist this Court's mandate in *Hudson*.

The timing of the Ninth Circuit's evisceration of *Hudson*'s independent verification requirement could not be worse in view of the recent proliferation of reported union fraud, embezzlement and other financial irregularities, no doubt exacerbated by lax accounting controls.[24]

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[23] *Cf. Prescott v. County of El Dorado*, 177 F.3d 1102, 1107 (9th Cir. 1999) ("we have no doubt that the [Supreme] Court did understand its own use of language").

[24] *See, e.g.*, Neely Tucker, *Teachers Union's Oversight Criticized*, Wash. Post, May 1, 2003, at B1 ("federal judge sharply criticized the American Federation of Teachers yesterday for failing to secure audits from the leadership of the Washington Teachers' Union for several years, allowing former local union leaders to allegedly loot at least $5 million from members."); Kevin Rothstein, *Blunder of it all; MTA official lost embezzled $$ at Foxwoods*, Boston Herald, May 6, 2003, at 1 (discussing $800,000 fraud perpetrated by official of NEA-affiliated union); Joe Mozingo, *UTD Case Prompts Federal Debate*, Miami Herald, June 20, 2003 (American Federation of Teachers president responded to recent teachers' union embezzlement: "'It is mind-boggling the scale of what happened to these locals . . . ."); Matthew I. Pinzer, *'We are taking back our union': Cuts loom; UTD payroll halved, $1.7 million in aid awaits*, Miami Herald, June 7, 2003 (Miami teachers union comptroller fired for approving payments to union president under federal investigation for embezzlement); Debra Barayuga, *Rodrigues Guilty: The powerful leader of the UPW is convicted*

(continued...)

The rule of law announced by the panel below, which now controls in the Ninth Circuit, conflicts with the decision of this Court in *Hudson*, the decisions of other Circuits, and the decision of every other federal court that has addressed these issues. The teachers respectfully request that this Petition for Writ of *Certiorari* be granted and either the decision below be summarily reversed, or the case be set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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July 2003

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[24] (...continued)
of defrauding his union in several ways, Honolulu Star Bulletin, Nov. 20, 2002 (President of public employee union convicted of 101 counts involving fraud, embezzlement, and money laundering).

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

15 April 2003

[326 F.3d 1042]

Douglas HARIK; Kyle Staples; Roxanna Escalante; Nance Contreras; Patricia Guthrie; Raymond Richardson; Karen Chavez; Kim Sheffield, Plaintiffs-Appellants,

v.

CALIFORNIA TEACHERS ASSOCIATION; Franklin-McKinley Education Association; South San Francisco Teachers Association; Los Angeles County Education Association; Saddleback Valley Education Association; Dinuba Teachers Association; William in his Official Capacity, Superintendent, Board of Education, Yuba City Unified School District; Larry in his Capacity as Superintendent, Franklin McKinley Elementary School District; Richard Rigg, in his Capacity as Superintendent, South San Francisco Unified School District; Donald in his Capacity as Superintendent, Los Angeles County Office of Education; Peter in his Capacity as Superintendent, Saddleback Valley Unified School District; Libia in her Official Capacity as Superintendent, Board of Education, Chula Vista Elementary School District, Dr.; Stan in his Official Capacity as Superintendent, Board of Education, Dinuba Unified School District; George in his Official Capacity as Superintendent, Chino Valley Unified School District, Dr.; Chula Vista Education Association; Association of Chino, Defendants-Appellees.

Douglas Harik; Kyle Staples; Roxanna Escalante; Nance Contreras; Patricia Guthrie; Raymond Richardson; Karen Chavez; Kim Sheffield, Plaintiffs-Appellees,

v.

California Teachers Association; Franklin McKinley Education Association; South San Francisco Teachers

Association; Los Angeles County Education Association; Saddleback Valley Education Association; Dinuba Teachers Association; Chula Vista Education Association; Association of Chino; Yuba City Unified Education Association, Defendants-Appellants,

and

William in his Official Capacity, Superintendent, Board of Education, Yuba City Unified School District; Larry in his Capacity as Superintendent, Franklin McKinley Elementary School District; Richard Rigg, in his Capacity as Superintendent, South San Francisco Unified School District; Donald in his Capacity as Superintendent, Los Angeles County Office of Education; Peter in his Capacity as Superintendent, Saddleback Valley Unified School District; Libia in her Official Capacity as Superintendent, Board of Education, Chula Vista Elementary School District, Dr.; Stan in his Official Capacity as Superintendent, Board of Education, Dinuba Unified School District; George in his Official Capacity as Superintendent, Chino Valley Unified School District, Dr., Defendants.

Douglas Harik; Kyle Staples; Roxanna Escalante; Nance Contreras; Patricia Guthrie; Raymond Richardson; Karen Chavez; Kim Sheffield, Plaintiffs-Appellees,

v.

California Teachers Association; Franklin McKinley Education Association; South San Francisco Teachers Association; Los Angeles County Education Association; Saddleback Valley Education Association; Dinuba Teachers Association; Chula Vista Education Association; Association of Chino, Defendants,

and

William in his Official Capacity, Superintendent, Board of Education, Yuba City Unified School District; Larry in his Capacity as Superintendent, Franklin McKinley Elementary School District; Richard Rigg, in his Capacity as Superintendent, South San Francisco Unified School District; Donald in his Capacity as Superintendent, Los Angeles County Office of Education; Peter in his Capacity as Superintendent, Saddleback Valley Unified School District; Libia in her Official Capacity as Superintendent, Board of Education, Chula Vista Elementary School District, Dr.; Stan in his Official Capacity as Superintendent, Board of Education, Dinuba Unified School District; George in his Official Capacity as Superintendent, Chino Valley Unified School District, Dr., Defendants-Appellants.

Nos. 01-15590, 01-15688, 01-15705.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted April 9, 2002.
Filed April 15, 2003.

* * * *

[1045]Before SCHROEDER, Chief Judge, B. FLETCHER and KOZINSKI, Circuit Judges.

ORDER WITHDRAWING OPINION, FILING OPINION AND DENYING REHEARING AND OPINION

SCHROEDER, Chief Judge.

ORDER

The panel opinion filed August 1, 2002, is withdrawn and the attached Opinion is ORDERED filed.

The panel as constituted above has otherwise voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R.App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

OPINION

The most significant issue we must decide in these consolidated appeals is what financial information unions must provide to non-members, in an agency shop, in order to support the amount of the agency fee. *See Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). We specifi-**[1046]**cally address whether the statement of the union's expenditures benefitting all members of the bargaining unit and hence chargeable to non-members must always be an audited statement. The district court held that it must be audited. The smallest of the defendant unions in this case, the Dinuba Teachers Association (DTA), challenges that ruling, contending that unaudited statements signed under penalty of perjury, coupled with an opportunity to examine the union's checkbook, suffice.

We hold that, while a formal audit is not required, the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification that the expenses were actually incurred. We reverse

the district court to the extent that its ruling is inconsistent with our holding. We also reverse the district court's ruling that the school superintendents are liable for any deficiencies in the union's *Hudson* notice, because under the law of this circuit the employer is not responsible for ensuring the accuracy of the *Hudson* notice before deducting agency fees from non-members' pay. *See Foster v. Mahdesian,* 268 F.3d 689, 694 (9th Cir.2001). We otherwise affirm.

I. Facts and Procedural History

Plaintiffs are non-union-member teachers in eight California school districts that have entered into agency fee agreements with the local teachers' unions. Under the agency fee agreements, the school districts deduct "agency fees" from the pay of any non-union-member employee within the bargaining unit represented by the local union and remit those fees to the local union. Those fees compensate the union for its efforts on behalf of all employees in the bargaining unit for activities such as collective bargaining, contract administration, and grievance adjustment. Those fees are known as "chargeable expenditures." *See Ellis v. Broth. Ry. Clerks,* 466 U.S. 435, 437, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) (approving the collection of such fees from non-members). The union may not, however, charge non-members fees to pay for those union activities "not sufficiently related to collective bargaining to justify their being imposed on dissenters," such as member-only services and political activities. *Id.* at 447, 104 S.Ct. 1883. These are known as "non-chargeable expenditures". *Id.*

Plaintiffs brought an action in federal court against the superintendents of their school districts, their respective local unions, and the California Teachers Association (CTA) alleging that the process by which the agency fees were deducted from

their paychecks violated the standards enunciated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). In *Hudson,* the Supreme Court addressed the procedures that unions must follow in informing non-members about the agency fees and in responding to their objections to the calculation of the fees. The Court held that the union must provide adequate information about its expenses and a means to challenge their validity. The union must give non-members "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. 1066. Plaintiffs in this case contended that the local unions failed to provide an adequate explanation of their fees because they did not provide non-members with audited financial statements. Plaintiffs also challenged CTA's notice of arbitration procedures, as well as **[1047]**the procedures themselves, on the ground that the unions rely on inadequate evidence of their chargeable expenditures in fee arbitrations. Plaintiffs sought certification of plaintiff classes on the audit and arbitration procedure issues, certification of a statewide plaintiff class on the arbitration notice issue, and certification of defendant classes of all California school districts and all local unions.

The district court certified plaintiff classes for each of the school districts in which the named plaintiffs were employed, but refused to certify a statewide plaintiff class to challenge the adequacy of the *Hudson* notice and refused to certify any defendant classes. The district court entered summary judgment in the plaintiffs' favor on the audit issue, and it entered summary

judgment in the defendants' favor on the arbitration notice and procedure challenges.

Plaintiffs appeal the grant of summary judgment to the defendants on the arbitration issues, as well as the district court's refusal to certify the statewide plaintiff class or any defendant classes. The school superintendent defendants cross-appeal, challenging the district court's certification of the plaintiff classes and the court's holding that the school superintendents are liable for notice violations committed by the local unions. The union defendants also cross-appeal, challenging the district court's certification of the plaintiff classes and the court's ruling that even the smallest local union, DTA, must provide audited financial statements.

We reverse the district court's grant of summary judgment to plaintiffs as to DTA, insofar as the district court required DTA to provide more than an independent verification that its claimed expenses were actually incurred. We reverse the district court's ruling that the school superintendents were liable for any deficiencies in the union's *Hudson* notice, because the school superintendents were not responsible for ensuring that the union had complied with *Hudson* before deducting agency fees from plaintiffs' pay. *See Foster,* 268 F.3d at 694. Otherwise, we affirm.

II. Whether All Locals Must Provide Audited Statements

At the beginning of each school year, each feepayer teacher represented by a CTA-affiliated local receives a notice on CTA letterhead explaining the purpose of agency fees and the manner in which the unions calculate those fees. Attached to the CTA notice are audited financial statements for the national union and CTA, and some type of financial disclosure for the particular local union representing the recipient teacher's

bargaining unit. Under a policy adopted by CTA in 1986, shortly after the *Hudson* decision, if the local union's total estimated annual revenue from member dues and agency fees is $100,000 or more, then the local union's financial disclosure must be in the form of a financial statement audited by an outside CPA. If the local union's estimated annual revenue is less than $100,000 but at least $50,000, then the financial disclosure can be simply reviewed by an outside CPA or audited by CTA's staff auditors. If the local union's estimated annual revenue is less than $50,000, the policy requires only that the local union provide feepayers access to the local union's check register and cancelled checks and provide copies of two forms, one required by IRS and the other by the California Public Employment Relations Board, signed by union officials under penalty of perjury, summarizing the local union's chargeable and non-chargeable expenditures.

The district court held that, under *Hudson,* each local union, regardless of size, must provide its members with audited **[1048]**financial statements indicating their chargeable and non-chargeable expenditures. The district court relied on our decisions in *Prescott v. County of El Dorado,* 177 F.3d 1102 (9th Cir.1999), *vacated,* 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807, *reinstated in pertinent part,* 204 F.3d 984 (9th Cir.2000). In that case, we held that a state union and its local affiliate were required to provide financial statements that had been subjected to "some auditor verifiable methodology" in order to provide feepayers a "reasonable opportunity to gauge whether the money taken from them is being spent on chargeable expenses." *Id.* at 1108-09. The district court appears to have interpreted *Prescott* to require all local unions to provide audited financial statements as part of their *Hudson* notice to feepayers.

In *Prescott,* however, we noted that accountants can provide three levels of scrutiny of financial documents. *Id.* at 1106. In the lowest level, "compilation", the accountant simply prepares a financial statement, relying on the union's records, without expressing any opinion as to the accuracy or completeness of the statement. *Id.* (citing Larry P. Bailey, *Miller GAAS Guide* 14.19-14.20 (1999)). The intermediate level, a "review", comes with the accountant's limited expression of assurance, examining records and, in reliance on the representations of the union's financial officers, stating that the accountant "is not aware of any material modifications that should be made to the financial statement" in order for it to comply with generally accepted accounting principles. *Id.* at 1107 (citing Bailey at 14.25-14.28). An "audit", the highest level of scrutiny, requires the accountant to examine the union's financial recording and control procedures, examine a sample of evidence supporting the amounts listed in the financial statement, confirm inventories, and verify accounts receivable. *Id.* (citing Bailey at 14.25- 14.26, 11.05-11.06). Audits themselves can vary in procedure and extent, and therefore involve varying degrees of certainty. *Id.* (citing Bailey at 9.05-9.07).

In *Prescott,* we did not hold that "a separate verified audit" is always required. *Id.* at 1108. We held some independent verification must be provided: "[W]hat is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way the union says they are." *Id.* at 1107; *see also Gwirtz v. Ohio Educ. Ass'n,* 887 F.2d 678, 682 (6th Cir.1989) (holding that *Hudson* does not require union to provide the highest level of audit, but only an independently verified financial statement sufficient to allow feepayers to gauge the propriety of the agency fee); *Andrews v. Educ. Ass'n of Cheshire,* 829 F.2d 335, 340 (2d Cir.1987)

(holding that *Hudson* requires the auditor, not to verify the proper categorization of expenditures as chargeable or nonchargeable, but merely to "ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses"). Insofar as the district court's order requires that the local unions provide more than a threshold level of independent verification that fees are not being used for non-chargeable expenditures, it is in conflict with our holding in *Prescott*.

This is not to say that the practice of the local unions in this case with revenues of less than $50,000 meets the requirements of *Prescott* and *Hudson*. The smallest local unions provide their feepayers with financial statements prepared only by union officials, and attested to only by those individuals, albeit under penalty of perjury. No outside individual reviews the accuracy of those financial statements. In addition, the checkbook and canceled **[1049]**checks to which the union provides access are only part of the information required to verify the financial statements; the unions do not provide feepayers access to other financial records, such as bills or inventories. The small local union's practice does not meet the requirement of *Hudson* and *Prescott* to provide its feepayers with either the full financial material necessary to verify, or an independently sanctioned verification of, the local union's chargeable and non-chargeable expenditures.

The union defendants contend that the smallest local unions should be excused from the independent verification requirement because the cost associated with such verification is disproportionately large when compared to their union's fee revenue. We have already held, however, that union costs do not trump non- members' First Amendment rights. As we stated in *Prescott,* "[e]xcessive cost cannot form the basis for allowing

the union or the government to avoid *Hudson's* requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights." *Prescott,* 177 F.3d at 1108 (quoting *Andrews,* 829 F.2d at 339). However, adequate disclosure under *Hudson* need not require substantial expense. *See Hudson,* 475 U.S. at 307 n. 18, 106 S.Ct. 1066. We are confident that smaller unions can devise flexible and creative "auditor verifiable methodolog[ies]", appropriately tailored to provide their nonmembers with a reasonable opportunity for meaningful verification, without depleting the union coffers. *See Prescott,* 177 F.3d at 1108-09; *Hudson,* 475 U.S. at 306-07, 106 S.Ct. 1066. For the smallest affiliates, providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials may be more cost-efficient than an external review; we need not dictate the particular procedure as long as it is sufficiently reliable to ensure that a nonmember can independently verify that the union spent its money where it claimed that it did. The district court did not err in holding that the financial information provided by the DTA was inadequate. It erred only in requiring more than adequate accessible information using an auditor verifiable methodology that could verify DTA's expenditures.

III. Superintendents' Liability

The district court entered a judgment against the school superintendent defendants on the audit issue, holding them liable along with the unions for the unions' failure to provide audited financial statements to non-members. On cross-appeal, the school superintendent defendants challenge the district court's ruling, relying on this court's recent decision in *Foster v. Mahdesian,* 268 F.3d 689 (9th Cir.2001), in which we held that an employer does not become liable for a union's breach of

Hudson's requirements unless and until that employer takes some adverse action against the feepayer, beyond the mere deduction of agency fees. *Id.* at 694. Such adverse action would include discipline or termination for non-payment of agency fees. *See Knight,* 131 F.3d at 817 (holding that duty to ensure proper *Hudson* notice arises "at the time the union seeks to take action against a nonmember for failure to pay the agency fee"). Under *Foster,* the superintendents have no responsibility to ensure the adequacy of the union's *Hudson* notice before withholding agency fees from non-members' pay. The district court therefore erred in entering judgment against the school superintendents, and we vacate that portion of the district court's decision.

[1050]IV. Challenge to the Arbitration Procedures and Notice

Hudson requires that the union provide feepayers an explanation of the basis of its fee and an expeditious means for feepayers to challenge the calculation in front of an impartial decision-maker. *Hudson,* 475 U.S. at 310, 106 S.Ct. 1066. CTA, in the *Hudson* notice sent to all feepayers of CTA-affiliated locals, explained that the amount of the agency fee was based on the most recent audited financial statements available for the state and national unions, and that the local unions charged a fee equivalent to the percentage of the state union's chargeable fees minus five percent. The notice explained that the local unions calculated their fee in this way because they believed that the percentage of the local's actual chargeable expenditures, a statement of which was attached to the notice, was at least equal to, and usually significantly higher than, the state union's chargeable percentage. This belief is sometimes called the "local union presumption." *See Prescott,* 177 F.3d at 1108. The notice also explained that the local unions had, in years past, successfully justified calculating their fee under this presumption

by presenting evidence of the actual expenditures of several representative local unions, thereby supporting the "local union presumption" on which their fee calculation was based. The notice explained that feepayers could request a refund of the nonchargeable portion of the fee and could challenge the calculated chargeable fee in arbitration by completing and returning a form. The notice said, in relevant part:

> The law allows chargeable agency fee estimates to be based on the most recent fiscal year for which audited figures are available. The California Teachers Association and the National Education Association made calculations regarding their estimated chargeable and nonchargeable expenditures for the 1999-00 school year based on audited financial statements from the 1997-98 school year, the most recent fiscal year for which such statements are available. These summaries are attached and include a full explanation regarding how the calculations were made. Under these calculations, the actual chargeable agency fee for CTA for the 1997-98 year is 68.1% and the actual chargeable agency fee for NEA for the 1997-98 year is 61.68%. These figures will be the chargeable percentages for 1999-00. In order to reduce the possibility of having to send additional rebate checks if the arbitrator adjusts the chargeable figure, CTA and NEA will pay fee objectors an additional rebate "cushion" of 5% of the fee.
>
> If you do not receive, concurrent with this letter, contrary notification from your local CTA chapter, your chapter will be adopting CTA's chargeable agency fee figure, with the 5% cushion, as its own for 1999-00. This is based on the presumption that the local's percentage of expenditures for representational purposes is at least as great, if not much greater, than this CTA percentage. Many

> chapters, in fact, spend all their local fees for chargeable purposes. CTA's use of the presumption has been upheld in twelve annual agency fee arbitration hearings based on evidence presented regarding the expenditures of a judgmental and/or random sample of CTA locals. Regardless of whether the presumption is adopted, however, each local chapter will provide its fee payers with a separate accounting of the chapter's chargeable and nonchargeable expenditures.
>
> If, after reading the enclosed information, you wish to object to your fee being spent for nonrepresentational activities, **[1051]**and to request that you receive a rebate for the nonchargeable amount, you must complete the enclosed form. . . . In addition, if you wish to challenge the calculation for CTA's, NEA's, or your local chapter's chargeable expenditures in an arbitration hearing, you must check the appropriate boxes on the form.

A form allowing feepayers to express their desire for a rebate and for arbitration was enclosed with the notice, as were the audited financial statements of CTA and NEA, and the financial disclosure of the particular feepayer's local.

The plaintiffs do not contend that they were denied the right to challenge the fee. The notice explains their right to request arbitration. Instead, they contend that the local unions violated their arbitration rights by presenting evidence supporting the local union presumption and thereby, according to the plaintiffs, relying on evidence insufficient to justify the fee charged. As the district court held, "this is a question of the quality of the evidence presented, to be determined by the arbitrator, and does not raise issues of constitutional law." Accordingly, if the plaintiffs wish to challenge the arbitrator's

reliance on the proffered evidence, they should do so by seeking review of the arbitrator's decision. In addition, the *Hudson* notice is not invalid because it describes the union's intention to present a particular kind of evidence. The notice accurately describes the feepayers' right to challenge the fee and evidence at arbitration. The district court did not err in granting summary judgment to the defendants on the plaintiffs' arbitration procedure and arbitration notice claims.

V. Class Certification

Plaintiffs sought certification of four classes: a class of plaintiffs consisting of all feepayer teachers employed in bargaining units represented by CTA-affiliated locals, a class of plaintiffs consisting of all feepayer teachers who received the *Hudson* notice from CTA, a class of defendants consisting of all school superintendents in districts whose teachers were represented by CTA-affiliated locals, and a class of defendants consisting of all CTA-affiliated locals. The district court certified only eight plaintiff classes, consisting of the feepayers in each of the eight districts in which one of the named plaintiffs was employed. Plaintiffs, on appeal, challenge the district court's refusal to certify the statewide plaintiff class of feepayers who received the CTA notice and its refusal to certify any defendant classes. Defendants, on cross-appeal, challenge the district court's certification of the eight plaintiff classes.

1. The Certified Plaintiff Classes

Defendants challenge the district court's certification of eight plaintiff classes, contending that the named plaintiffs are not adequate class representatives as required by Rule 23(a)(4), because their litigation goals conflict with the interests of some class members, and that the certified classes do not meet the

numerosity requirements of Rule 23(a)(1). *See* Fed.R.Civ.P. 23(a)(1), (4).

The classes comprised of agency feepayers in the Dinuba, Franklin McKinley, and Chino teachers' associations contain only seven, nine, and ten members, respectively. The Supreme Court has held fifteen is too small. *General Tel. Co. v. EEOC,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). The certification of those classes must be vacated on numerosity grounds. The defendants acknowledge that the classes comprised of agency feepayers in the Yuba City, Saddleback Valley, and South San Francisco districts present a closer question because the **[1052]**members exceed sixty, and the defendants never presented any reason to the district court why they did not meet the numerosity requirement. The plaintiffs point out that the small amounts involved in the individual claims and judicial economy can be considered. Here the plaintiffs seek only prospective relief and so the interests of judicial economy are served by the certifications. We have no basis on which to invalidate the remaining certifications on numerosity grounds.

The defendants abandoned their numerosity challenge in the district court, and we do not ordinarily consider on appeal issues not raised below. *United States v. Stenberg,* 803 F.2d 422, 431 (9th Cir.1986). In support of their adequacy argument, the defendants cite *Gilpin v. Am. Fed'n. of State, County, & Mun. Employees,* 875 F.2d 1310, 1313 (7th Cir.1989), where the Seventh Circuit found that plaintiffs who sought damage remedies from a union that allegedly failed to comply with *Hudson* could not be certified as a class because at least some class members were probably "free rider[s]" who wished to receive the services of a healthy union while paying as little as possible for them. No such concerns can be present here, where

the plaintiffs seek only injunctive relief requiring the unions to comply with their constitutional duties as set forth in *Hudson*. We therefore do not need to decide whether we agree with the Seventh Circuit that free riders create a conflict of interest within a proposed class. The district court's plaintiff class certification must be affirmed.

2. The Refusal To Certify a Statewide Plaintiff Class

The district court refused to certify the proposed class of all feepayers who receive the CTA notice. Because we hold that the district court correctly entered summary judgment in favor of CTA on the arbitration notice claim, we need not decide whether the district court should have certified a plaintiff class.

3. Refusal To Certify Defendant Classes

Plaintiffs sought certification of a defendant class of all CTA- affiliated local unions and a defendant class of all school superintendents whose employees were represented by those unions. The named defendants, the local unions and school superintendents of the districts in which the plaintiffs work, would serve as representatives for classes comprised of local unions and school superintendents in districts other than those in which the plaintiffs teach. Rule 23(b)(2) permits the certification of a class if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). The eight plaintiff classes have taken no action with respect to the proposed defendant classes. Indeed, plaintiffs have no relationship whatsoever to the proposed defendant classes, because plaintiffs are employed only by the school districts whose superintendents are named defendants. The district court did not abuse its discretion in

holding that the proposed defendant classes should not be certified under Rule 23(b)(2).

VI. Conclusion

For the foregoing reasons, we vacate the decision of the district court that DTA must provide an audited financial statement to its members as part of the *Hudson* notice, and we remand for modification of the judgment against the Dinuba Teachers Association. We vacate the certification of the classes of teachers in the Dinuba, Franklin McKinley, and Chino districts. **[1053]**We also vacate the district court's grant of summary judgment against the school superintendents on the audit claim and remand for entry of judgment dismissing the action against them. We affirm the judgment of the district court in all other respects.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1 August 2002

[298 F.3d 863]

Douglas HARIK; Kyle Staples; Roxanna Escalante; Nance Contreras; Patricia Guthrie; Raymond Richardson; Karen Chavez; Kim Sheffield, Plaintiffs-Appellants,

v.

CALIFORNIA TEACHERS ASSOCIATION; Franklin McKinley Education Association; South San Francisco Teachers Association; Los Angeles County Education Association; Saddleback Valley Education Association; Dinuba Teachers Association; William in his Official Capacity, Superintendent, Board of Education, Yuba City Unified School District; Larry in his Capacity as Superintendent, Franklin McKinley Elementary School District; Richard Rigg, in his Capacity as Superintendent, South San Francisco Unified School District; Donald in his Capacity as Superintendent, Los Angeles County Office of Education; Peter in his Capacity as Superintendent, Saddleback Valley Unified School District; Libia in her Official Capacity as Superintendent, Board of Education, Chula Vista Elementary School District, Dr.; Stan in his Official Capacity as Superintendent, Board of Education, Dinuba Unified School District; George in his Official Capacity as Superintendent, Chino Valley Unified School District, Dr.; Chula Vista Education Association; Association of Chino, Defendants-Appellees.

Douglas Harik; Kyle Staples; Roxanna Escalante; Nance Contreras; Patricia Guthrie; Raymond Richardson; Karen Chavez; Kim Sheffield, Plaintiffs-Appellees,

v.

California Teachers Association; Franklin McKinley Education Association; South San Francisco Teachers

Association; Los Angeles County Education Association; Saddleback Valley Education Association; Dinuba Teachers Association; Chula Vista Education Association; Association of Chino; Yuba City Unified Education Association, Defendants-Appellants,

and

William in his Official Capacity, Superintendent, Board of Education, Yuba City Unified School District; Larry in his Capacity as Superintendent, Franklin McKinley Elementary School District; Richard Rigg, in his Capacity as Superintendent, South San Francisco Unified School District; Donald in his Capacity as Superintendent, Los Angeles County Office of Education; Peter in his Capacity as Superintendent, Saddleback Valley Unified School District; Libia in her Official Capacity as Superintendent, Board of Education, Chula Vista Elementary School District, Dr.; Stan in his Official Capacity as Superintendent, Board of Education, Dinuba Unified School District; George in his Official Capacity as Superintendent, Chino Valley Unified School District, Dr., Defendants.

Douglas Harik; Kyle Staples; Roxanna Escalante; Nance Contreras; Patricia Guthrie; Raymond Richardson; Karen Chavez; Kim Sheffield, Plaintiffs-Appellees,

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California Teachers Association; Franklin McKinley Education Association; South San Francisco Teachers Association; Los Angeles County Education Association; Saddleback Valley Education Association; Dinuba Teachers Association; Chula Vista Education Association; Association of Chino, Defendants,

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William in his Official Capacity, Superintendent, Board of Education, Yuba City Unified School District; Larry in his Capacity as Superintendent, Franklin McKinley Elementary School District; Richard Rigg, in his Capacity as Superintendent, South San Francisco Unified School District; Donald in his Capacity as Superintendent, Los Angeles County Office of Education; Peter in his Capacity as Superintendent, Saddleback Valley Unified School District; Libia in her Official Capacity as Superintendent, Board of Education, Chula Vista Elementary School District, Dr.; Stan in his Official Capacity as Superintendent, Board of Education, Dinuba Unified School District; George in his Official Capacity as Superintendent, Chino Valley Unified School District, Dr., Defendants-Appellees.

Nos. 01-15590, 01-15688, 01-15705

United States Court of Appeals, Ninth Circuit

* * * *

[866]Before: SCHROEDER, Chief Judge, B. FLETCHER and KOZINSKI, Circuit Judges.

SCHROEDER, Chief Judge.

The most significant issue we must decide in these consolidated appeals is what financial information unions must provide to non-members, in an agency shop, in order to support the amount of the agency fee. *See Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). We specifically address whether the statement of

the union's expenditures benefitting all members of the bargaining unit and hence chargeable to non-members must always be an audited statement. The district court held that it must be audited. The smallest of the defendant unions in this case, the Dinuba Teachers Association (DTA), challenges that ruling, contending that unaudited statements signed under penalty of perjury, coupled with an opportunity to examine the union's checkbook, suffice.

We hold that, while a formal audit is not required, the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification that the expenses were actually incurred. We reverse the district court to the extent that its ruling is inconsistent with our holding. We also reverse the district court's ruling that the school superintendents are liable for any deficiencies in the union's *Hudson* notice, because under the law of this circuit the employer is not responsible for ensuring the accuracy of the *Hudson* notice before deducting agency fees from nonmembers' pay. *See Foster v. Mahdesian,* 268 F.3d 689, 694 (9th Cir.2001). We otherwise affirm.

[867]I. Facts and Procedural History

Plaintiffs are non-union-member teachers in eight California school districts that have entered into agency fee agreements with the local teachers' unions. Under the agency fee agreements, the school districts deduct "agency fees" from the pay of any non-union-member employee within the bargaining unit represented by the local union and remit those fees to the local union. Those fees compensate the union for its efforts on behalf of all employees in the bargaining unit for activities such as collective bargaining, contract administration, and grievance adjustment. Those fees are known as "chargeable

expenditures." *See Ellis v. Ry. Clerks,* 466 U.S. 435, 437, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) (approving the collection of such fees from non-members). The union may not, however, charge nonmembers fees to pay for those union activities "not sufficiently related to collective bargaining to justify their being imposed on dissenters," such as member-only services and political activities. *Id.* at 447, 104 S.Ct. 1883. These are known as "non-chargeable expenditures". *Id.*

Plaintiffs brought an action in federal court against the superintendents of their school districts, their respective local unions, and the California Teachers Association (CTA) alleging that the process by which the agency fees were deducted from their paychecks violated the standards enunciated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). In *Hudson,* the Supreme Court addressed the procedures that unions must follow in informing non-members about the agency fees and in responding to their objections to the calculation of the fees. The Court held that the union must provide adequate information about its expenses and a means to challenge their validity. The union must give non- members "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. 1066. Plaintiffs in this case contended that the local unions failed to provide an adequate explanation of their fees because they did not provide nonmembers with audited financial statements. Plaintiffs also challenged CTA's notice of arbitration procedures, as well as the procedures themselves, on the ground that the unions rely on inadequate evidence of their chargeable expenditures in fee arbitrations. Plaintiffs sought

certification of plaintiff classes on the audit and arbitration procedure issues, certification of a statewide plaintiff class on the arbitration notice issue, and certification of defendant classes of all California school districts and all local unions.

The district court certified plaintiff classes for each of the school districts in which the named plaintiffs were employed, but refused to certify a statewide plaintiff class to challenge the adequacy of the *Hudson* notice and refused to certify any defendant classes. The district court entered summary judgment in the plaintiffs' favor on the audit issue, and it entered summary judgment in the defendants' favor on the arbitration notice and procedure challenges.

Plaintiffs appeal the grant of summary judgment to the defendants on the arbitration issues, as well as the district court's refusal to certify the statewide plaintiff class or any defendant classes. The school superintendent defendants cross-appeal, challenging the district court's certification of the plaintiff classes and the court's holding that the school superintendents are liable for notice violations committed by **[868]**the local unions. The union defendants also cross-appeal, challenging the district court's certification of the plaintiff classes and the court's ruling that even the smallest local union, DTA, must provide audited financial statements.

We reverse the district court's grant of summary judgment to plaintiffs as to DTA, insofar as the district court required DTA to provide more than an independent verification that its claimed expenses were actually incurred. We reverse the district court's ruling that the school superintendents were liable for any deficiencies in the union's *Hudson* notice, because the school superintendents were not responsible for ensuring that the union had complied with *Hudson* before deducting agency fees

from plaintiffs' pay. *See Foster,* 268 F.3d at 694. Otherwise, we affirm.

II. Whether All Locals Must Provide Audited Statements

At the beginning of each school year, each feepayer teacher represented by a CTA-affiliated local receives a notice on CTA letterhead explaining the purpose of agency fees and the manner in which the unions calculate those fees. Attached to the CTA notice are audited financial statements for the national union and CTA, and some type of financial disclosure for the particular local union representing the recipient teacher's bargaining unit. Under a policy adopted by CTA in 1986, shortly after the *Hudson* decision, if the local union's total estimated annual revenue from member dues and agency fees is $100,000 or more, then the local union's financial disclosure must be in the form of a financial statement audited 10829 by an outside CPA. If the local union's estimated annual revenue is less than $100,000 but at least $50,000, then the financial disclosure can be simply reviewed by an outside CPA or audited by CTA's staff auditors. If the local union's estimated annual revenue is less than $50,000, the policy requires only that the local union provide feepayers access to the local union's check register and cancelled checks and provide copies of two forms, one required by IRS and the other by the California Public Employment Relations Board, signed by union officials under penalty of perjury, summarizing the local union's chargeable and non-chargeable expenditures.

The district court held that, under *Hudson,* each local union, regardless of size, must provide its members with audited financial statements indicating their chargeable and non-chargeable expenditures. The district court relied on our decisions in *Prescott v. County of El Dorado,* 177 F.3d 1102 (9th

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This is not to say that the practice of the local unions in this case with revenues of less than $50,000 meets the requirements of *Prescott* and *Hudson.* The smallest local unions provide their feepayers with financial statements prepared only by union officials, and attested to only by those individuals, albeit under penalty of perjury. No outside individual reviews the accuracy of those financial statements. In addition, the checkbook and canceled checks to which the union provides access are only part of the information required to verify the financial statements; the unions do not provide feepayers access to other financial records, such as bills or inventories. The small local union's practice does not meet the constitutional requirement of *Hudson*

and *Prescott* to provide its feepayers with an independent verification of the local union's chargeable and non-chargeable expenditures.

The union defendants contend that the smallest local unions should be excused from the independent verification requirement because the cost associated with such verification is disproportionately large when compared to their union's fee revenue. We have already held, however, that union costs do not trump non-members' First Amendment rights. As we stated in *Prescott,* "[e]xcessive cost cannot form the basis for allowing the union or the government to avoid *Hudson's* requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights." *Prescott,* 177 F.3d at 1108 (quoting *Andrews,* 829 F.2d at 339). The district court did not err in holding that the financial information provided by the DTA was inadequate. It erred only in requiring more **[870]**than an independent accountant's verification of DTA's expenditures.

III. Superintendents' Liability

The district court entered a judgment against the school superintendent defendants on the audit issue, holding them liable along with the unions for the unions' failure to provide audited financial statements to non-members. On cross-appeal, the school superintendent defendants challenge the district court's ruling, relying on this court's recent decision in *Foster v. Mahdesian,* 268 F.3d 689 (9th Cir.2001), in which we held that an employer does not become liable for a union's breach of *Hudson's* requirements unless and until that employer takes some adverse action against the feepayer, beyond the mere deduction of agency fees. *Id.* at 694. Such adverse action would include

discipline or termination for non-payment of agency fees. *See Knight,* 131 F.3d at 817 (holding that duty to ensure proper *Hudson* notice arises "at the time the union seeks to take action against a nonmember for failure to pay the agency fee"). Under *Foster,* the superintendents have no responsibility to ensure the adequacy of the union's *Hudson* notice before withholding agency fees from non-members' pay. The district court therefore erred in entering judgment against the school superintendents, and we vacate that portion of the district court's decision.

IV. Challenge to the Arbitration Procedures and Notice

Hudson requires that the union provide feepayers an explanation of the basis of its fee and an expeditious means for feepayers to challenge the calculation in front of an impartial decision-maker. *Hudson,* 475 U.S. at 310, 106 S.Ct. 1066. CTA, in the *Hudson* notice sent to all feepayers of CTA-affiliated locals, explained that the amount of the agency fee was based on the most recent audited financial statements available for the state and national unions, and that the local unions charged a fee equivalent to the percentage of the state union's chargeable fees minus five percent. The notice explained that the local unions calculated their fee in this way because they believed that the percentage of the local's actual chargeable expenditures, a statement of which was attached to the notice, was at least equal to, and usually significantly higher than, the state union's chargeable percentage. This belief is sometimes called the "local union presumption." *See Prescott,* 177 F.3d at 1108. The notice also explained that the local unions had, in years past, successfully justified calculating their fee under this presumption by presenting evidence of the actual expenditures of several representative local unions, thereby supporting the "local union presumption" on which their fee 10833 calculation was based.

The notice explained that feepayers could request a refund of the nonchargeable portion of the fee and could challenge the calculated chargeable fee in arbitration by completing and returning a form. The notice said, in relevant part:

> The law allows chargeable agency fee estimates to be based on the most recent fiscal year for which audited figures are available. The California Teachers Association and the National Education Association made calculations regarding their estimated chargeable and nonchargeable expenditures for the 1999-00 school year based on audited financial statements from the 1997-98 school year, the most recent fiscal year for which such statements are available. These summaries are attached and include a full explanation regarding how the calculations were made. Under these calculations, the actual chargeable agency fee for CTA for the 1997-98 year **[871]**is 68.1% and the actual chargeable agency fee for NEA for the 1997-98 year is 61.68%. These figures will be the chargeable percentages for 1999-00. In order to reduce the possibility of having to send additional rebate checks if the arbitrator adjusts the chargeable figure, CTA and NEA will pay fee objectors an additional rebate "cushion" of 5% of the fee.
>
> If you do not receive, concurrent with this letter, contrary notification from your local CTA chapter, your chapter will be adopting CTA's chargeable agency fee figure, with the 5% cushion, as its own for 1999-00. This is based on the presumption that the local's percentage of expenditures for representational purposes is at least as great, if not much greater, than this CTA percentage. Many chapters, in fact, spend all their local fees for chargeable purposes. CTA's use of the presumption has been upheld in twelve annual agency fee arbitration

> hearings based on evidence presented regarding the expenditures of a judgmental and/or random sample of CTA locals. Regardless of whether the presumption is adopted, however, each local chapter will provide its fee payers with a separate accounting of the chapter's chargeable and nonchargeable expenditures.
>
> If, after reading the enclosed information, you wish to object to your fee being spent for nonrepresentational activities, and to request that you receive a rebate for the nonchargeable amount, you must complete the enclosed form . . . . In addition, if you wish to challenge the calculation for CTA's, NEA's, or your local chapter's chargeable expenditures in an arbitration hearing, you must check the appropriate boxes on the form.

A form allowing feepayers to express their desire for a rebate and for arbitration was enclosed with the notice, as were the audited financial statements of CTA and NEA, and the financial disclosure of the particular feepayer's local.

The plaintiffs do not contend that they were denied the right to challenge the fee. The notice explains their right to request arbitration. Instead, they contend that the local unions violated their arbitration rights by presenting evidence supporting the local union presumption and thereby, according to the plaintiffs, relying on evidence insufficient to justify the fee charged. As the district court held, "this is a question of the quality of the evidence presented, to be determined by the arbitrator, and does not raise issues of constitutional law." Accordingly, if the plaintiffs wish to challenge the arbitrator's reliance on the proffered evidence, they should do so by seeking review of the arbitrator's decision. In addition, the *Hudson* notice is not invalid because it describes the union's intention to

present a particular kind of evidence. The notice accurately describes the feepayers' right to challenge the fee and evidence at arbitration. The district court did not err in granting summary judgment to the defendants on the plaintiffs' arbitration procedure and arbitration notice claims.

V. Class Certification

Plaintiffs sought certification of four classes: a class of plaintiffs consisting of all feepayer teachers employed in bargaining units represented by CTA-affiliated locals, a class of plaintiffs consisting of all feepayer teachers who received the *Hudson* notice from CTA, a class of defendants consisting of all school superintendents in districts whose teachers were represented by CTA-affiliated locals, and a class of defendants consisting of all CTA-affiliated locals. The district court certified only eight plaintiff classes, consisting of the feepayers in each of the eight districts in **[872]**which one of the named plaintiffs was employed. Plaintiffs, on appeal, challenge the district court's refusal to certify the statewide plaintiff class of feepayers who received the CTA notice and its refusal to certify any defendant classes. Defendants, on cross-appeal, challenge the district court's certification of the eight plaintiff classes.

1. The Certified Plaintiff Classes

Defendants challenge the district court's certification of eight plaintiff classes, contending that the named plaintiffs are not adequate class representatives as required by Rule 23(a)(4), because their litigation goals conflict with the interests of some class members, and that the certified classes do not meet the numerosity requirements of Rule 23(a)(1). *See* Fed.R.Civ.P. 23(a)(1), (4).

The classes comprised of agency feepayers in the Dinuba, Franklin McKinley, and Chino teachers' associations contain only seven, nine, and ten members, respectively. The Supreme Court has held fifteen is too small. *General Tel. Co. v. EEOC,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). The certification of those classes must be vacated on numerosity grounds. The defendants acknowledge that the classes comprised of agency feepayers in the Yuba City, Saddleback Valley, and South San Francisco districts present a closer question because the members exceed sixty, and the defendants never presented any reason to the district court why they did not meet the numerosity requirement. The plaintiffs point out that the small amounts involved in the individual claims and judicial economy can be considered. Here the plaintiffs seek only prospective relief and so the interests of judicial economy are served by the certifications. We have no basis on which to invalidate the remaining certifications on numerosity grounds.

The defendants abandoned their numerosity challenge in the district court, and we do not ordinarily consider on appeal issues not raised below. *United States v. Stenberg,* 803 F.2d 422, 431 (9th Cir.1986). In support of their adequacy argument, the defendants cite *Gilpin v. Am. Fed'n. of State, County, & Mun. Employees,* 875 F.2d 1310, 1313 (7th Cir.1989), where the Seventh Circuit found that plaintiffs who sought damage remedies from a union that allegedly failed to comply with *Hudson* could not be certified as a class because at least some class members were probably "free rider[s]" who wished to receive the services of a healthy union while paying as little as possible for them. No such concerns can be present here, where the plaintiffs seek only injunctive relief requiring the unions to comply with their constitutional duties as set forth in *Hudson.* We therefore do not need to decide whether we agree with the

Seventh Circuit that free riders create a conflict of interest within a proposed class. The district court's plaintiff class certification must be affirmed.

2. The Refusal To Certify a Statewide Plaintiff Class

The district court refused to certify the proposed class of all feepayers who receive the CTA notice. Because we hold that the district court correctly entered summary judgment in favor of CTA on the arbitration notice claim, we need not decide whether the district court should have certified a plaintiff class.

3. Refusal To Certify Defendant Classes

Plaintiffs sought certification of a defendant class of all CTA- affiliated local unions and a defendant class of all school superintendents whose employees were represented by those unions. The named defendants, the local unions and school **[873]**superintendents of the districts in which the plaintiffs work, would serve as representatives for classes comprised of local unions and school superintendents in districts other than those in which the plaintiffs teach. Rule 23(b)(2) permits the certification of a class if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). The eight plaintiff classes have taken no action with respect to the proposed defendant classes. Indeed, plaintiffs have no relationship whatsoever to the proposed defendant classes, because plaintiffs are employed only by the school districts whose superintendents are named defendants. The district court did not abuse its discretion in holding that the proposed defendant classes should not be certified under Rule 23(b)(2).

VI. Conclusion

For the foregoing reasons, we vacate the decision of the district court that DTA must provide an audited financial statement to its members as part of the *Hudson* notice, and we remand for modification of the judgment against the Dinuba Teachers Association. We vacate the certification of the classes of teachers in the Dinuba, Franklin McKinley, and Chino districts. We also vacate the district court's grant of summary judgment against the school superintendents on the audit claim and remand for entry of judgment dismissing the action against them. We affirm the judgment of the district court in all other respects.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

APPENDIX C

FINAL ORDER AND JUDGMENT
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

23 February 2001

[Clerk's stamps omitted in printing]

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KIM SHEFFIELD, *et al.*,	
Plaintiffs,	Civil Action No.: C00-776 CAL
v.	
CALIFORNIA TEACHERS ASSOCIATION, *et al.*,	~~[PROPOSED]~~ **FINAL ORDER and JUDGMENT**
Defendants.	

In this case, eight nonunion public school teachers, each of whom is employed in a separate California school district, sued (1) the California Teachers Association (the "CTA"), (2) eight CTA-affiliated local teachers unions which represent them in collective bargaining (the "Local Unions"), and (3) eight public officials who were sued in their official capacities as superintendents of the school districts which employ the plaintiffs (the "Superintendents"). The plaintiffs challenge the procedures under which they are required to pay agency fees to the Local Unions. Specifically, the plaintiffs allege that the agency fee collection procedures used by or relied upon by the defendants are at variance with the constitutional requirements set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), and subsequent cases interpreting that decision.

The plaintiffs allege three constitutional violations in three causes of action:

> (a) The Local Unions and Superintendents collect the Local Unions' portion of the agency fee pursuant to a *Hudson* notice that states that each CTA-affiliated local labor **[2]**union can satisfy its constitutional obligation to substantiate before a neutral fact finder the chargeable expenditures on which it bases its portion of the agency fee by relying upon the fact finder's determinations regarding chargeable expenditures of other CTA-affiliated local labor unions, some of which are chosen at random;
>
> (b) The Local Unions and Superintendents commenced collection of the Local Unions' portion of the agency fee pursuant to procedures that did not require each Local Union to provide evidence of its own chargeable expenditures before a neutral fact finder but instead permitted each local union to rely upon evidence of the

chargeable expenditures of other CTA-affiliated local labor unions, some of which were chosen at random; and

(c) The Local Unions and Superintendents commenced collection of the Local Unions' portion of the agency fee from nonunion employees and did not provide those employees with independently audited financial information of the Local Union.

The defendants deny these claims.

For each of the three alleged constitutional violations, the plaintiffs seek bilateral class certification. Specifically, for each claim, the plaintiffs seek certification of (a) a plaintiff class consisting of affected nonunion teachers, and (b) two defendant classes, one defendant class consisting of local teachers unions and another defendant class consisting of corresponding school district employers. Thus, in total, the plaintiffs seek certification of three plaintiff classes and six defendant classes affecting CTA-affiliated labor unions and corresponding school districts statewide which have agreed to an agency shop provision in the collective bargaining agreement. The defendants oppose certification of the various classes on several grounds.

The plaintiffs moved for class certification and a preliminary injunction. The defendants opposed the motions. At a hearing on July 14, 2000, the parties agreed to convert the preliminary injunction papers to cross-motions for summary judgment. The cross-motions for summary judgment and plaintiffs' motion for class certification came on for hearing August 8, 2000. The Court, having heard the arguments of counsel and having examined the briefs and other papers filed in connection with the motions, and being otherwise fully advised in the premises, rules as follows:

[3]I. Findings of Undisputed Fact

1. At all relevant times, the plaintiffs were not members of the labor union defendants.

2. Each Superintendent and corresponding Local Union has entered a collective bargaining agreement which requires the school district employer to withhold union agency fees from nonunion employees' salaries.

3. Pursuant to the applicable California labor statute, Cal. Educ. Code § 45061, and their respective collective bargaining agreements, the school districts withhold agency fees from the plaintiffs' pay without the plaintiffs' authorization.

4. Each plaintiff has timely filed an objection to paying the portion of the agency fee not lawfully chargeable to objecting nonunion employees.

5. Although, in each instance, an agency fee equal to full union dues was initially withheld from the plaintiffs' pay and paid to the union defendants, the plaintiffs' agency fees were held in escrow until nonunion employees were identified, notified of their right to object to payment of the nonchargeable portion of the agency fee, and indicated their intent to do so, whereupon the nonchargeable portion was subsequently rebated to the plaintiffs.

6. The agency fee charged to each plaintiff as well as to other nonunion employees in the bargaining units is based on ***pro rata*** expenditures incurred by three affiliated labor organizations: (1) the National Education Association of the United States (the "NEA"), (2) the CTA, and (3) the CTA-affiliated local union that represents the nonunion employee's collective bargaining unit. The school districts withhold all three components of the agency fee from the nonunion

employees' salary. The fees are remitted to the Local Unions, which pay to the NEA and CTA their respective portions.

7. The CTA maintains, for both itself and its affiliated local unions, agency fee collection procedures ("CTA's Agency Fee Collection and Rebate Procedure") which CTA administers on its own behalf and on behalf of those of its affiliated local unions that elect to utilize and participate in these procedures. This set of procedures, or a similar prior version, has historically been used by almost all of the 450 CTA-affiliated local unions that have agency shop provisions included in the relevant collective bargaining agreements. These procedures prescribe, among other [4]things, the minimum form of financial disclosure and verification which the CTA-affiliated local unions are to provide to agency fee payers, and the procedures through which agency fee payers may challenge each component of the agency fee before an independent fact finder.

8. The Local Union defendants in this case exercised their option to participate in CTA's Agency Fee Collection and Rebate Procedure for purposes of discharging their procedural obligations set forth in *Hudson*, 475 U.S. 292 (1986). Specifically, the CTA mailed a *Hudson* notice to persons whom the Local Union informed CTA were nonunion employees in the collective bargaining unit. This notice included a two-page letter drafted by CTA describing agency fee payers' *Hudson* rights. It also included financial statements and agency fee calculations from NEA and CTA, and, if provided to CTA, financial statements and agency fee calculations from the Local Unions. Like almost all CTA-affiliated local unions with agency shop, each defendant Local Union relied upon the above-described *Hudson* notice for the purpose of discharging its constitutional obligation to notify agency fee payers of (i) their

right to challenge the amount of the agency fee and (ii) the procedures by which that challenge would be resolved.

9. Included in the *Hudson* notice were financial statements and a statement of chargeable and nonchargeable expenses of both the NEA and CTA. This financial information was verified by a licensed certified public accountant. The Local Unions' statements of chargeable and nonchargeable expenses provided to the plaintiffs did not reflect verification by an independent auditor.

10. Under CTA's Agency Fee Collection and Rebate Procedure, (1) participating local unions with gross annual revenues of $100,000 or more must provide agency fee payers annually with a statement of chargeable and nonchargeable expenditures, verified by a certified public accountant; (2) participating local unions with gross annual revenues between $50,000 and $100,000 must provide agency fee payers annually with a statement of chargeable and nonchargeable expenditures, verified by either a certified public accountant or an auditor employed by the CTA; and (3) participating local unions with gross annual revenues below $50,000 must provide agency fee payers annually with a statement of chargeable and nonchargeable expenditures, a copy of the local union's financial report required to be filed with the Public Employment Relations Board (which requires that the union identify the "expenditures that constitute the basis for the amount of agency **[5]**fee or fair share fee" and is signed by a local officer under penalty of perjury), a copy of the local union's IRS Form 990 Information Return, and notification that an agency fee payer may inspect the local union's check register and canceled checks for the fiscal year on which the statement of expenditures is based. These documents are sent to the agency fee payers by CTA if they are provided to CTA, or they may be sent by the local unions

directly to the agency fee payers. All CTA-affiliated local unions which participate in CTA's agency fee arbitration proceeding are required to abide by CTA's Agency Fee Collection and Rebate Procedures. In addition, these local unions are required to use CTA's chargeable percentage as their own in calculating the local union's portion of the agency fee.

11. In order to enable agency fee payers to challenge the amount of all three components of the agency fee before an independent fact finder, CTA enlists the services of the American Arbitration Association ("AAA") to select an arbitrator to preside over the challenge proceedings. These proceedings are conducted pursuant to the AAA's "Rules for Impartial Determination of Union Fees."

12. As in prior years, the NEA and CTA presented affirmative evidence of their chargeable expenditures in the most recent arbitration proceeding. The Local Union defendants, however, established their chargeable agency fee by presenting evidence supporting the local union presumption. Based on this evidence, the arbitrator approved the Local Union defendants' chargeable agency fee.

13. Under the local union presumption, it is presumed that the local unions commit a larger proportion of their resources to collective bargaining and other activities chargeable to agency fee payers than does the state-wide parent labor organization. The actual chargeable and nonchargeable expenditures of each local union is not used for purposes of determining the local union's portion of the agency fee charged to agency fee payers. Instead, the local union adopts the chargeability percentage of the parent labor organization (in this case, further reduced by an additional five percent cushion to protect against inadvertent overcharges) and applies that percentage to the local portion of

member dues to calculate the local portion of the chargeable agency fee. This methodology is briefly described in the CTA's *Hudson* notice, which states:

> **[6]**[Absent] contrary notification from your local CTA chapter, your chapter will be adopting CTA's chargeable agency fee figure . . . as its own for 1999-00. This is based on the presumption that the local's percentage of expenditures for representational purposes is at least as great [as], if not much greater[] than[,] this CTA percentage . . . . CTA's use of the presumption has been upheld in twelve annual agency fee arbitration hearings based on evidence presented regarding the expenditures of a judgmental and/or random sample of CTA locals.

14. In the 1999-2000 school year, there were approximately 180 CTA-affiliated local unions which had challengers in their bargaining units and thus were obligated to have the chargeable agency fee determined by a neutral fact finder. To prove the validity of the local union's use of the CTA's chargeable percentage, the CTA selected eight local unions which introduced evidence of their chargeable and nonchargeable expenditures. CTA selected one local union from each of CTA's three UniServe categories (the local union in each category with the largest number of objectors among those that had not previously participated in the arbitration) and selected the remaining five local unions at random. CTA also presented evidence regarding activities typically undertaken by CTA compared to those typically undertaken by CTA local unions. Specifically, CTA alleged that the evidence demonstrated that local unions are far less likely to spend dues and agency fees for major nonchargeable categories such as political campaign activities, lobbying, and membership

recruitment, and are more likely to engage in chargeable activities such as bargaining and grievance processing. CTA also presented evidence regarding prior arbitration decisions that had approved the local presumption and that demonstrated that the difference in activities typically undertaken by CTA compared to CTA local unions is consistent over time.

15. Each plaintiff timely filed a challenge to his or her own bargaining unit's agency fee calculation and thereby requested arbitration of the NEA, CTA, and Local Union's calculation of the chargeable amount. None of the Local Union defendants was selected as one of the sample local unions in the most recent arbitration proceedings. Instead, evidence was presented as described above. Each exemplar local union required approximately one-half to one full day to present evidence. The eight sample local unions presented evidence of their chargeable expenditures over a seven working day period. The agency fee payers were free to present evidence refuting the local union presumption. The agency fee arbitration rules of the American Arbitration Association do not address the parties' subpoena power in agency fee arbitrations, but AAA makes signed subpoenas [7]available to participants to compel the attendance of witnesses and the production of documents at the hearing. Agency fee payers who participated in the most recent agency fee arbitration subpoenaed documents and witness testimony and introduced such evidence at the agency fee arbitration.

II. Conclusions of Law

A. Class Certification

16. Plaintiffs seek certification of three plaintiff classes under Fed. R. Civ. P. 23(a), 23(b)(1)(A), and 23(b)(2), and six defendant classes under Fed. R. Civ. P. 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2).

17. The defendants contend that the plaintiffs do not meet the requirements of Fed. R. Civ. P. 23(a)(3) and (4) because there is a conflict between the named plaintiffs and the proposed class members. Specifically, the defendants contend that adherence to the procedural requirements that plaintiffs maintain the Constitution requires will result in (a) all agency fee payers paying more in agency fees than they currently do because, by using CTA's chargeable percentage (reduced by a five percent cushion), local unions charge agency fee payers less than if the local union's own chargeable percentage were used as the basis for determining the amount of the local union's agency fee; and (b) additional union expenditures which will be paid for through an increase in dues and agency fees and/or a diversion of economic resources that will reduce the level of service presently provided by the Local Union. The defendants contend that any of these results would be at variance with the economic interests of the proposed class members.

18. The defendants also oppose class certification on the ground that none of the alternative bases for certification under Rule 23(b) have been satisfied. Specifically, the defendants contend that the requirements for defendant class certification under Rules 23(b)(1)(A) and (B) have not been satisfied in this case and Rule 23(b)(2) permits certification of defendant classes only in limited circumstances not present here. The defendants also contend that the requirements for plaintiff classes under Rules 23(b)(1)(A) and 23(b)(2) have not been satisfied.

19. Moreover, the defendants argue that *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973) and its progeny preclude certification of bilateral class actions unless each named [8]plaintiff and each unnamed proposed plaintiff class member has a claim against each named defendant and each unnamed proposed defendant class member. The plaintiffs

counter that the *La Mar* Court identified two exceptions to its bar against bilateral class certification: (1) where all injuries are the result of a conspiracy or concerted scheme between the defendants at whose hands the class suffered injury; or (2) where all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious. The parties dispute whether these exceptions are applicable in this case.

20. The Court will certify plaintiff classes, albeit not the classes proposed by plaintiffs. The Court finds that the numerosity and commonality elements of Rule 23 for the proposed plaintiff classes are satisfied.

21. The main issues of dispute regarding the Rule 23(a) requirements for plaintiff class certification are issues of adequacy of representation and typicality. The defendants contend that there is a conflict between the named plaintiffs and the proposed class members sufficient to preclude class certification. The argument is based on *Gilpin v. AFSCME, AFL-CIO*, 875 F.2d 1310 (7th Cir. 1989), and similar cases from other Circuits. In addition, the defendants argue that plaintiffs' success on the merits would result in a higher agency fee, a result not favored by some agency fee payers. Because the plaintiffs are seeking primarily injunctive and declaratory relief in connection with their free speech rights (albeit there is a claim for nominal damages) and because the Court will be limiting the plaintiff classes to nonunion teachers in the eight school districts in which the named plaintiffs work, the risk of conflict is too speculative here to forestall class certification.

22. Under the Ninth Circuit's decision in *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), bilateral class actions generally cannot be maintained unless each named

plaintiff and each unnamed proposed plaintiff class member has a claim against each named defendant and each unnamed proposed defendant class member. However, the *La Mar* Court provided two exceptions to this rule. The common scheme exception to the *La Mar* rule is applicable in this case. CTA has a centralized position in the Local Unions' and Superintendents' enforcement of their agency fee requirements. Almost all CTA-affiliated local unions participate in the CTA's agency fee collection procedures pursuant to which the CTA prescribes the language used [9]in the portion of the *Hudson* notice which describes the agency fee payers' rights and determines the arbitration procedures. Whether this concerted activity is accomplished by contract, agreement, or fiat is irrelevant.

23. The requirements for certification of a plaintiff class under Rule 23(b)(1)(A) are satisfied in this case. That rule provides that class certification is warranted where separate actions would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class, in this case the defendants. Inasmuch as the defendants employ or rely upon one common set of agency fee collection procedures, the risk of inconsistent adjudication and incompatible standards of conduct is apparent.

24. The requirements for certification of a plaintiff class under Rule 23(b)(2) are also satisfied in this case. Rule 23(b)(2) provides that class certification is appropriate if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This case almost exclusively pertains to equitable relief. Thus, plaintiffs meet the Rule 23(b)(2) standard.

25. The requirements for certification of defendant classes under Rule 23(b) have not been satisfied. Thus, the Court need not address the Rule 23(a) requirements as to the defendant classes.

26. For defendant class certification, Rule 23(b)(1)(A) requires that the plaintiffs be subject to incompatible standards of conduct. That situation is not presented here.

27. The requirements for certification of a defendant class under Rule 23(b)(1)(B) also have not been satisfied. This provision permits class certification when separate actions would create a risk of adjudications "which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." The fact that a judgment in one individual action may have precedential effect upon a later case does not warrant class certification under this provision. Further, there is no potential for claim preclusion to be asserted against absent potential class members.

[10]28. Although the Ninth Circuit has yet to rule upon the issue, in the situation presented here, the Court holds that Rule 23(b)(2) is inapplicable to certification of a defendant class as the Seventh and other circuits have held. *See Henson v. East Lincoln Township*, 814 F.2d 410, 413-16 (7th Cir. 1987); *Thompson v. Board of Education*, 709 F.2d 1200, 1204 (6th Cir. 1983); *Paxman v. Campbell*, 612 F.2d 848, 854 (4th Cir. 1980) (en banc); *but see Marcera v. Chinlund*, 595 F.2d 1231, 1238 (2nd Cir. 1979).

29. Because the Court does not certify defendant classes, the Court will certify a limited plaintiff class to be divided so as to form eight (8) separate plaintiff classes, each of which will be represented by the plaintiff who will represent nonunion

teachers employed in his or her school district for purposes of asserting the claims of the class against only the relevant superintendent and union defendants. This is because the Court cannot allow all nonunion teachers in the State of California to proceed against these eight school districts and local unions to which members of a state-wide class would have no relationship. Neither may the Court allow the nonunion teachers who are employed by one school district and paying agency fees to one local union to be a class claimant against another school district or local union. To do so would be to contravene *La Mar* and its exceptions.

30. The Court also declines to certify a state-wide plaintiff class against the CTA because such a class would be too broad and the *La Mar* exception will not stretch that far.

B. First Amendment Requirements

31. The plaintiffs contest the adequacy of the Local Unions' financial disclosure included with the *Hudson* notice. In *Foster v. Garcy*, No. C97-4433 CAL, 1999 WL 1788185 (N.D. Cal. October 15, 1999), this Court held that under the Ninth Circuit's decision in *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999), *vacated in part*, 163 L.R.R.M. 2994, 2000 U.S. Dist. LEXIS 3137 (9th Cir. 2000), the financial disclosure provided by the union defendants in that case was constitutionally inadequate. The Court sees no reason to depart from its ruling in that case. The Local Unions' financial disclosure in this case fails to meet the constitutional standard announced in *Foster*. For the reasons set forth in the Court's opinion in *Foster*, the public employers in this case are also liable because they failed to ensure that the plaintiffs' constitutional rights had been [11]observed prior to commencing involuntary withholding of the agency fees.

Accordingly, the Court will grant the plaintiffs and the class members nominal damages against the Local Unions as well as injunctive and declaratory relief against the Local Unions and the Superintendents.

32. This Court's decision in *Foster* did not speak to the plaintiffs' second claim regarding the type of evidence used to validate the local union presumption in the arbitration proceedings. The plaintiffs contend that the Supreme Court's decision in *Hudson* requires each of the Local Unions to establish its entitlement to collect the agency fee by presenting specific evidence of its own chargeable expenditures. The defendants contend that this is simply an evidence question, and that evidence in the arbitration of how a sample of CTA-affiliated local unions spend their money, along with historical and current evidence regarding the nature of typical CTA and local union expenditures, may properly be found by an arbitrator to substantiate the validity of the local unions' adoption of CTA's chargeable percentage as their own.

33. *Hudson* recognizes that agency fee arbitrations should be expeditious. Thus, in *ALPA v. Miller*, 523 U.S. 866 (1998), the Supreme Court recognized the importance of limiting the expense and disruption of multiple agency fee challenges and sanctioned the consolidation of challenges for consideration in a single arbitration. *Hudson* does not require agency fee arbitrations to contain all of the evidentiary safeguards applicable in civil litigation, nor does *Hudson* require absolute precision in the calculation of chargeable expenditures. Rather, as in any proceeding, statistical evidence based on samples can be used to support the Local Unions' chargeable calculation.

34. Although *Prescott* indicated that use of the local union presumption is not permissible for purposes of supplying non-

members with the financial information accompanying the *Hudson* notice, the decision does not speak to the use of the local union presumption or sampling at arbitration proceedings. The Court holds that the Local Unions can, consistent with the Constitution, employ a local union presumption, supported by, among other things, statistical evidence, to carry their burden of proof at the arbitration proceedings because this is a question of the quality of the evidence presented, to be determined by the arbitrator, and does not raise issues of constitutional law. The challengers can attack the Local Unions' methodology and offer direct evidence of the Local Unions' expenditures to rebut the Local Unions' evidence. This procedure satisfies constitutional requirements for protecting the rights of the plaintiffs and also provides for a prompt arbitration. The Court will therefore grant summary judgment for CTA, the Local Unions, and the Superintendents on this issue.

35. In light of the Court's ruling as to the plaintiffs' claim regarding use of a sample at the arbitration proceeding, the plaintiffs' claim that the *Hudson* notice improperly stated that the Local Unions can rely upon an arbitrator's findings regarding chargeable expenditures based on a sample of local unions must also be rejected. Summary judgment for the defendants is granted on this claim as well.

36. The parties' entitlements to costs and reasonable attorney's fees under 42 U.S.C. § 1988 and the availability of any defenses thereto shall be determined separately.

Upon the foregoing:

IT IS HEREBY **ORDERED** that the motion for class certification is **GRANTED** in part and **DENIED** in part as follows:

(a) Pursuant to Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), in the claims against the Franklin McKinley Education Association and Superintendent Larry Aceves, the Court certifies a plaintiff class represented by plaintiff Kim Sheffield consisting of all nonunion employees (i) employed by Franklin McKinley Elementary School District and (ii) represented in collective bargaining by Franklin McKinley Education Association, and (iii) who, at any time after September 1, 1999 have had agency fees withheld from their pay;

(b) Pursuant to Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), in the claims against the South San Francisco Classroom Teachers Association and Superintendent Richard Rigg, the Court certifies a plaintiff class represented by plaintiff Douglas Harik consisting of all nonunion employees (i) employed by South San Francisco Unified School District and (ii) represented in collective bargaining by South San Francisco Classroom Teachers Association, and (iii) who, at any time after September 1, 1999 have had agency fees withheld from their pay;

(c) Pursuant to Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), in the claims against the Los Angeles County Education Association and Superintendent Donald Ingwerson, the Court certifies a plaintiff class represented by plaintiff Kyle Staples consisting of all nonunion employees (i) employed by Los Angeles County Office of Education and (ii) represented in collective bargaining by Los Angeles County Education Association, and (iii) who, at any time after September 1, 1999 have had agency fees withheld from their pay;

(d) Pursuant to Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), in the claims against the Saddleback Valley Educators Association and Superintendent Peter Hartman, the Court certifies a plaintiff class represented by plaintiff Roxanna Escalante consisting of all nonunion employees (i) employed by Saddleback Valley Unified School District and (ii) represented in collective bargaining by Saddleback Valley Educators Association, and (iii) who, at any time after September 1, 1999 have had agency fees withheld from their pay;

(e) Pursuant to Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), in the claims against the Yuba City Unified Education Association and Superintendent William Wong, the Court certifies a plaintiff class represented by plaintiff Nance Contreras consisting of all nonunion employees (i) employed by Yuba City Unified School District and (ii) represented in collective bargaining by Yuba City Unified Education Association, and (iii) who, at any time after September 1, 1999 have had agency fees withheld from their pay;

(f) Pursuant to Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), in the claims against the Chula Vista Educators Association and Superintendent Libia Gil, the Court certifies a plaintiff class represented by plaintiff Patricia Guthrie consisting of all nonunion employees (i) employed by Chula Vista Elementary School District and (ii) represented in collective bargaining by Chula Vista Educators Association, and (iii) who, at any time after September 1, 1999 have had agency fees withheld from their pay;

(g) Pursuant to Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), in the claims against the Dinuba Teachers Association and Superintendent Stan Carrizosa, the Court certifies a plaintiff class represented by plaintiff Raymond Richardson consisting of all nonunion employees (i) employed by Dinuba Unified School District and (ii) represented in collective bargaining by Dinuba Teachers Association, and (iii) who, at any time after September 1, 1999 have had agency fees withheld from their pay; and

(h) Pursuant to Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), in the claims against the Associated Chino Teachers and Superintendent George Bloch, the Court certifies a plaintiff class represented by plaintiff Karen Chavez consisting of all nonunion employees (i) employed by Chino Valley Unified School District and (ii) represented in collective bargaining by Associated Chino Teachers, and (iii) who, at any time after September 1, 1999 have had agency fees withheld from their pay.

IT IS HEREBY FURTHER **ORDERED** that the cross motions for summary judgment are **GRANTED** in part and **DENIED** in part as described above. The Court enters judgment for the defendants and against the plaintiffs on the first and second claims alleging that examining only a sample of local unions at the arbitration proceedings and issuing a *Hudson* notice which describes this procedure violates the Constitution and 42 U.S.C. § 1983. The Court enters judgment for the plaintiffs and against the defendants on the third claim alleging the local unions' failure to provide independently verified financial disclosure of their major category of expenses violates the Constitution and 42 U.S.C. § 1983.

THE COURT HEREBY **DECLARES** that the defendant Local Unions, by accepting agency fees from the plaintiffs without providing them with independently verified financial disclosure of the local union's major categories of expenses, and the defendant public officials sued in their official capacities as school district superintendents, by withholding agency fees from the plaintiffs without the Local Unions' providing plaintiffs with independently verified financial disclosure of the local union's major categories of expenses, have violated the plaintiffs' rights as set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

THE COURT HEREBY **ENJOINS** the Local Union defendants from collecting or withholding from the wages and salaries of the plaintiffs and class members any amounts to be paid to the Local Unions for agency fees without providing the agency fee payers independently verified financial disclosure of the Local Union's major categories of expenses and with the union's allocation of those expenses between chargeable and nonchargeable categories.

THE COURT HEREBY **ORDERS** the Local Union defendants to pay nominal damages of $1 to each named plaintiff and class member from whom agency fees were collected for the constitutional deprivation occasioned by the illegal withholding of agency fees.

The Clerk of the Court is directed to enter this order as judgment. ~~consistent with this Order.~~

DATED this 23 day of February, 2001.

/s/
Charles A. Legge
United States District Judge

Presented by:

/s/ Mark J. Beutler

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APPENDIX D

UNITED STATES CONSTITUTION
First Amendment

UNITED STATES CONSTITUTION
First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX E

UNITED STATES CONSTITUTION
Fourteenth Amendment

UNITED STATES CONSTITUTION
Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> **Section 1.** . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

APPENDIX G

CALIFORNIA GOVERNMENT CODE
Section 3546(a)

CALIFORNIA GOVERNMENT CODE

§ 3546. Member of recognized employee organization or payment of fair share service fee; condition of employment

(a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Board, to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative.

APPENDIX H

CALIFORNIA EDUCATION CODE
Section 45061

CALIFORNIA EDUCATION CODE

§ 45061. Deductions for organization service fees

The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.

If the employees of a district do not authorize the board to make a deduction to pay their pro rata share of the costs of making deductions for the payment of service fees to the certificated or recognized organization, the board shall deduct from the amount transmitted to the organization on whose account the payments were deducted the actual costs, if any, of making the deduction. No charge shall exceed the actual cost to the district of the deduction. These actual costs shall be determined by the board and shall include startup and ongoing costs.

APPENDIX I

PETITION OF APPELLANT SHALER AREA EDUCATION ASSOCIATION FOR REHEARING OR REHEARING EN BANC

17 April 2003

Nos. 01-3858, 01-4110

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARSHA OTTO; F. NAYLOR EMORY; DENNIS ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, on behalf of themselves and all other nonmembers similarly situated,

Plaintiffs/Appellees/Cross-Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; SHALER AREA EDUCATION ASSOCIATION, on behalf of themselves and all other local associations similarly situated.

Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District
Court for the Middle District of Pennsylvania

PETITION OF APPELLANT SHALER AREA
EDUCATION ASSOCIATION FOR
REHEARING OR REHEARING EN BANC

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* * * *

INTRODUCTION

* * * *

SAEA requests rehearing principally because, in an amended opinion released on April 15, 2003, the Ninth Circuit has answered that question in the negative. Harik v. California Teachers Association, No. 01-15590 (9th Cir. Apr. 15, 2003). That decision is in direct conflict with the panel's holding "that every union collecting fair-share fees from non-members must subject its disclosed financial information to independent auditor verification," slip op. at 10, which invariably means "formal audits of their financial statements." Id. at 11. This direct conflict between the panel opinion and the decision of another federal court of appeals provides ample reason for this Court to reexamine the issue, particularly because of the panel opinion's reliance on the Ninth Circuit's earlier, now-withdrawn, opinion in Harik. See id. at 9. In addition, the panel's decision is irreconcilable with earlier decisions of the D.C. and Seventh Circuits.

* * * *

ARGUMENT

* * * *

The panel in this case did not have the benefit of the Ninth Circuit's analysis in the revised Harik opinion; indeed, the panel relied in part on the opinion that has now been withdrawn. Because the holdings of the Ninth Circuit and this Court are now squarely in conflict, this Court should grant rehearing in order to reconsider the issue presented in light of Harik.

2. While the panel's decision thus squarely conflicts with the Ninth Circuit's resolution of precisely the same issue on substantially the same facts, the conflict between this Court and other federal circuits is even more profound than that. The panel's opinion stands for the proposition - indeed, the opinion explicitly holds - that a small local union cannot ever satisfy its financial disclosure obligation under Hudson in any way other than through an independent audit of its expenditures.

* * * *

[Certificate of Service is dated April 16, 2003]
[Court docket sheet indicates filed April 17, 2003]

(2)

No. 03-89

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
SEP 15 2003
OFFICE OF THE CLERK

KIM SHEFFIELD, *et al.*,
Petitioners,

v.

LARRY ACEVES, in His Capacity as Superintendent, Franklin McKinley Elementary School District, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

UNION RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals properly held that a public employer incurs no liability under 42 U.S.C. § 1983 for failing to police the details of the union's annual agency fee notice issued pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), unless the employer takes adverse action against the feepayers beyond making routine payroll deductions for agency fees.

II. Whether the Court of Appeals properly held that small local unions with low annual revenues and relatively simple finances can fulfill *Hudson*'s requirement of providing their nonmembers with "sufficient information to gauge the propriety of the union's fee," enabling them to make the relatively simple decision whether to challenge the union's calculation of the fee, by providing them with a statement of the union's chargeable and non-chargeable expenditures and affording them access to the union's financial books, records and associated documents, rather than through a formal and costly independent audit.

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IN THE

Supreme Court of the United States

No. 03-89

KIM SHEFFIELD, *et al.*,
Petitioners,

v.

LARRY ACEVES, in His Capacity as Superintendent, Franklin McKinley Elementary School District, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

UNION RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

We do not take issue with the facts stated in the Petition's Statement of the Case (Pet. at 3-6), although we do disagree with the characterizations and legal conclusions intertwined therein.

REASONS FOR DENYING THE WRIT

Respondents join in, adopt, and incorporate herein by reference the arguments presented in the Brief in Opposition to *Certiorari* filed by the Respondent Superintendents as to why certiorari should not be granted on Question Presented I.

This brief addresses the reasons why certiorari should be denied on Question Presented II: there is no conflict between the Court of Appeals' decision and Supreme Court precedent; the issue was correctly decided by the Court of Appeals; the conflict among the circuit courts and state courts is relatively recent and very shallow; and the question is not of substantial importance, so that the issue should be addressed by other courts before it merits this Court's attention.

First, the Court of Appeals' decision was not contrary to this Court's precedent. This Court requires unions to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," in order to decide whether to challenge the union's calculation of the amount of the fee. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986). In *Hudson*, this Court considered the sufficiency of the information provided by a large local union representing a bargaining unit of 27,500 employees, with an annual budget of $4.1 million, and did not decide whether very small local unions may provide nonmembers with sufficient financial information to allow independent verification of the union's breakdown of expenses by methods other than a formal audit. *See* Section II.

Second, the Court of Appeals' determination that small local unions can fulfill *Hudson*'s notice requirements by providing nonmembers with financial information that can be independently verified, rather than through a formal audit, was correct. The finances of many small local unions such as the one involved in the present case—which had just 231 members and annual revenues of less than $30,000—are sufficiently simple that a layperson could easily examine and understand the union's financial records in order to determine whether to challenge the fee's calculation. Further, a requirement that small local unions conduct formal audits would cost such unions far more money than they receive from nonmember agency feepayers and, as such, would

conflict with this Court's prohibition on unnecessarily restricting a union's ability "to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977)). *See* Section III.

Third, the division among the courts does not yet warrant this Court's intervention. The Court of Appeals' decision is in conflict with just one decision by another court of appeals and one decision by a state supreme court. Only one other state court has directly addressed the issue, reaching the same conclusion as the Court of Appeals. The first of the relevant decisions was issued in 1999. Thus, the split has emerged very recently and is extremely shallow, and the issue would benefit from further development in the lower courts before it merits this Court's attention. *See* Section IV.

Fourth, the question whether small local unions must provide nonmembers with financial information that is verified by a formal audit as part of their *Hudson* notices is not an important legal issue. It arises in a limited number of states (those that allow *both* collective bargaining by public employees *and* agency fees), concerns only small local unions, and involves a very small amount of money. *See* Section V.

I. LEGAL AND FACTUAL BACKGROUND

This Court has held that individuals who are part of a bargaining unit that is represented by a union, but who elect not to become members of that union, may be required to pay that union a fee (typically called an "agency fee" or "fair share fee") which helps to defray the union's costs of representational services that benefit union members and nonmembers alike. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26, 232 (1977). These services include, but are not limited to, "negotiating and administering a collective-bargaining agreement and representing the interests

of employees in settling disputes and processing grievances." *Id.* at 221. Requiring payment of an agency fee serves "to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 221-22. However, nonmembers may not be required to contribute to a union's political or ideological expenditures over their objection. *Id.* at 235-36. Thus, the Court has sought to accomplish "the objective" of "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237.

In order to do so, the Court has allowed unions to require nonmembers to contribute only their proportionate share of revenues that are spent on "chargeable" (i.e., non-political or ideological) activities. To protect nonmembers' right not to be forced to contribute to the union's "non-chargeable" expenses, a union must give nonmembers "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. The union's explanation of the basis for the fee must set forth "sufficient information to gauge the propriety of the union's fee," so that nonmembers can decide whether to file an objection challenging the proportionate share amount. *Id.* at 306. Filing such a challenge is cost-free, and triggers the requirement that the union submit the dispute over the fee amount to the impartial decisionmaker mentioned above.[1] *Id.* at 307.

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[1] By filing a challenge, the feepayer automatically becomes a party to the annual *Hudson* arbitration of agency fee challenges that regularly

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT

In *Hudson*, the Court held invalid the notice provided by the Chicago Teachers Union ("CTU"), which had disclosed only its "non-chargeable" expenditures to nonmembers and provided no information about the expenditures that it deemed chargeable, "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee" that the union had assessed. 475 U.S. at 306. The CTU had determined that the chargeable expenditures amounted to 95% of union dues, but provided information only about the 5% of its budget that was allegedly made up of non-chargeable expenses; thus, feepayers had no information at all about 95% of the union's expenditures. *Id.* at 295, 306-07. Accordingly, the Court held that "[a]n acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%." *Id.* at 307. In a footnote, the Court emphasized that "absolute precision" in the calculation and explanation of the fee is not required, and that the CTU "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but commented that "adequate disclosure

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occurs on an annual basis. The feepayer need not personally participate in, or even attend, the arbitration in order to obtain the benefit of any reduction in the fee ordered by the arbitrator. The arbitrator's decision is binding on the union, but does not preclude the feepayer from challenging the fee on a *de novo* basis in court. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.5 (1998); *Hudson*, 475 U.S. at 308 n.21; *Bromley v. Michigan Education Ass'n*, 82 F.3d 686, 692-95 (6th Cir. 1996). Thus, filing a challenge to the fee neither costs the feepayer anything nor has any adverse effect upon the available litigation options. "[M]ounting a challenge is for all practical intents and purposes free." *Gilpin v. American Fed. of State, County & Municipal Employees*, 875 F.2d 1310, 1316 (7th Cir. 1989).

surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n.18 (brackets deleted). The language in this footnote, which (as we show below) relates *only* to the mammoth CTU, is the basis for petitioners' contention that the Court of Appeals' decision is contrary to this Court's precedent.

Respondent Dinuba Teachers Association ("DTA"), like other small affiliates of the California Teachers Association ("CTA"), annually provides nonmember feepayers with a "*Hudson* notice" that contains a full breakdown of its actual chargeable and nonchargeable expenditures for the relevant prior fiscal year, together with its calculation of the overall percentage of its expenditures that is chargeable to objecting feepayers. The union's statement is supported by financial reporting forms required by California's Public Employment Relations Board, which, *inter alia*, set out the union's major categories of expenditures that are chargeable and non-chargeable to agency feepayers. Thus, in contrast to the union in *Hudson*, DTA provides feepayers with full disclosure of all the major categories of 100% of its expenses, including both chargeable and non-chargeable expenditures. And although not audited, these statements of the union's chargeable and non-chargeable expenditures are sworn to by a union officer under penalty of perjury. In addition, each feepayer is informed that he or she may, upon request, inspect the union's detailed financial records, *i.e.*, its checkbook and cancelled checks.[2]

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[2] DTA's feepayers also receive fully audited financial statements (unchallenged by petitioners) showing the chargeable and nonchargeable expenditures of its parent affiliates, CTA and the National Education Association ("NEA"), on which the agency fees charged by those affiliates are based. These CTA and NEA fees constitute by far the major portion of the agency fee that DTA nonmembers are required to pay. Thus, feepayers *do* receive audited financial disclosure with regard to the

The Court of Appeals held DTA's notice constitutionally deficient, because the financial information it provided feepayers was "only part of the information required to verify the financial statements." *Harik v. California Teachers Ass'n*, 326 F.3d 1042, 1048-49 (9th Cir. 2003). In doing so, however, it rejected petitioners' contention that small unions such as DTA can only meet *Hudson*'s requirements through a formal audit. *Id.* at 1046. Instead, it held that a union "must provide a statement of its chargeable and nonchargeable expenses, together with independent verification that the expenses were actually incurred," and that smaller unions could fulfill this requirement by "devis[ing] flexible and creative 'auditor verifiable methodolog[ies],' appropriately tailored to provide their nonmembers with a reasonable opportunity for meaningful verification, without depleting the union coffers." *Id.* at 1046, 1049 (citations omitted; second brackets in original). Specifically, the court noted that, "[f]or the smallest affiliates, providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials may be more cost-efficient than an external review." *Id.* at 1049. But rather than "dictat[ing] the particular procedure" such unions should follow, the Court of Appeal required that it be "sufficiently reliable to ensure that a nonmember can independently verify that the union spent its money where it claimed that it did." *Id.*

The Court of Appeals' holding was fully consistent with Supreme Court precedent. In *Hudson*, this Court did not announce a rule that every union, regardless of size, budget, or complexity of finances, must provide a formally audited financial statement as part of its notice to nonmembers. Rather, *Hudson* held that nonmembers must be given "adequate disclosure of the reasons why they were required to

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lion's share of the fair share fee, and a statement of expenditures along with the right to examine financial records with regard to the rest.

pay" the fee calculated by the union. 475 U.S. at 307. That is, they must not be left "in the dark about the source of the figure for the agency fee," but should be given "sufficient information to gauge the propriety" of the fee. *Id.* at 306. In the context of a case involving large union with complicated finances—like the union involved in *Hudson*—this necessitated a formally audited financial statement. *Id.* at 307 n.18.

CTU, the union in *Hudson*, had 27,000 members and annual revenues exceeding $4.1 million. *See id.* at 294, 298 n.4. This union doubtless would have obtained an annual audit of its expenditures as a matter of course, but nonetheless had left members in the dark about all but 5% of its expenses. More importantly, given the complexity of the finances of a multi-million dollar organization like CTU, there is no other way that the union could have provided nonmembers with the opportunity to independently verify the union's account of its expenditures. A nonmember would be overwhelmed if provided with the raw data concerning the $4.1 million in expenditures on which CTU's fee was based. Therefore, the Court determined that an audit was required in the circumstances of that case. In fact, the Court made it clear that in its footnote concerning the "audit" requirement it was addressing CTU specifically (rather than unions generally) by referring to "the Union" (with a capital "U") rather than "the union" generically. Earlier in its decision, the Court had made clear that it used the term "the Union" (with a capital "U") to refer specifically to the CTU. *See, e.g., Hudson*, 475 U.S. at 294-95.

The question presented to the Court of Appeals in the instant case, in contrast, was whether the Court's footnote requiring a large union organization to obtain a formal audit necessarily applies in full measure to a union like respondent DTA—a small local affiliate of the CTA—which, in the relevant fiscal year, had some 231 members, no professional

staff, a budget of less than $30,000, and seven agency fee-payers from whom it collected a total of $613.17 in agency fees. SER 109, 168-70, 173. The Court's footnote with respect to unions the size of CTU cannot be applied, and surely was never intended to be applied, without analysis, to an entity like DTA that is less than 1/100th the size of CTU measured by membership or revenue, for which the costs of an audit would far exceed the amount of revenue that it collects from nonmembers. This is especially true given that, unlike the CTU, which left its feepayers "in the dark" by disclosing *no* financial information regarding 95% of its expenditures, the DTA disclosed financial information regarding 100% of its expenditures.

Permitting a small local union to provide its disclosure by methods other than a formal audit is fully consistent with both the letter and spirit of *Hudson*'s holding, as long as nonmembers are provided with adequate information to allow them to verify the description of the union's actual expenses.[3]

III. THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE

The Court of Appeals reached the right conclusion in light of the relevant precedent and the purpose of the financial disclosure requirement. A contrary ruling—that all local unions must obtain and distribute formal audits, regardless of their size—would have served no discernable purpose and

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[3] In fact, the requirements that the Court of Appeals' decision imposes on small unions that do not obtain formal audits go far beyond the disclosure of the "major categories of expenses" required by *Hudson*. By allowing feepayers to inspect their checkbooks, canceled checks, bills and other materials, unions would afford feepayers something the *Hudson* Court expressly *declined* to require: the opportunity to inspect the original records of *all the union's expenditures*. *See* 475 U.S. at 307 n.18 ("The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures . . . ."); *compare Harik*, 326 F.3d at 1049.

would contravene this Court's clear directive that unions must be able to require nonmembers to contribute to the costs of collective bargaining.

It is evident why formally audited financial statements may be the only feasible way of providing feepayers with the requisite financial disclosure in the case of a multi-million dollar organization like CTU, which has complicated finances that would not be easily understood simply by providing a nonmember with the underlying source documents that show the union's expenses. However, it is eminently feasible for a smaller union such as DTA, whose financial transactions are neither extensive nor complicated, to provide feepayers with adequate information in other, more cost-effective ways to permit them to make informed decisions about whether to challenge the fee. The financial affairs of a small local union such as DTA "will be no more complex than a teacher's family finances." SER 75 (Declaration of Martin Benis, Certified Public Accountant). DTA's expenditures are sufficiently few in number that interested nonmembers can be given the union's financial books and records and associated documents to see for themselves the purposes for which the union's money was spent.

The purpose of the financial disclosure that *Hudson* requires, it must be remembered, is not to prove that the union's calculation of chargeable versus non-chargeable expenditures is correct. Rather, the purpose is simply to enable feepayers to make informed decisions about whether to accept the union's calculation of its agency fee or to exercise their right to challenge the fee so that the union will be required to meet its burden of proof before an independent decisionmaker. *See, e.g., Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991) ("The test of adequacy of the initial explanation to be provided by the union is not whether the information supplied is sufficient to enable the employee to determine in any final sense whether the union's

proposed fee is a correct one, but only whether the information is sufficient to enable the employee to decide whether to object. If the employee objects, *then* the union will be called upon to demonstrate more completely its justi-fication for the fee"). Once such a challenge is made, it is the union's burden to establish, to the satisfaction of an independent decisionmaker, its entitlement to the fee that it seeks. *See Hudson*, 475 U.S. at 307-08. In deciding whether to challenge the fee, the feepayer is contemplating an act that—in contrast to many other endeavors undertaken in reliance on audited or non-audited financial statements—not only involves a simple decision, but is virtually cost-free and risk-free: if in doubt, the feepayer need only submit a challenge, which costs nothing but the price of a first-class stamp. *See* note 1, *supra.*

In light of the limited purpose of this financial disclosure, nonmembers will be able to review quite easily the relatively simple finances of a small local union in order to determine whether to file a challenge.[4] The mere absence of a formal audit does not mean that nonmembers will be left "in the dark about the source of the figure for the agency fee" and "requir[ed] . . . to object in order to receive information." *Hudson*, 475 U.S. at 306. To the contrary, they will receive *greater* disclosure than feepayers of larger unions. *See* note 3, *supra.* Under these circumstances, a small local union such as DTA need not obtain a formal audit in order to fulfill

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[4] For this reason, petitioners' contention that nonmembers will be required to spend 33 hours reviewing the union's finances is off the mark. Pet. at 21. The purpose of nonmembers' review will not be to prepare a formal audit, but to make the simple decision whether to submit a challenge. Nonmembers are not being "press[ed] . . . into serving as [unions'] auditors." Pet. at 20. Nor would a nonmember need to identify which expenses he or she is challenging in order to file a challenge. *See Air Line Pilots Ass'n*, 523 U.S. at 878. For that reason, petitioners' citation to *Abood*'s admonition that nonmembers not be required to monitor the union's expenses is simply inapposite. Pet. at 20 (citing *Abood*, 431 U.S. at 241).

Hudson's requirement that feepayers be informed of the union's "major categories of expenses," so that they have "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306, 307 n.18.

Besides being unnecessary, a requirement that small local unions such as DTA obtain formal audits in order to collect fees from nonmembers would eviscerate the right of these unions to require nonmembers to contribute to the costs of collective bargaining. *See Hudson*, 475 U.S. at 302; *Abood*, 431 U.S. at 221-22, 237. The cost of a formal audit of DTA's expenditures would dwarf the amount DTA stands to collect in agency fees—DTA would have had to spend on the order of $2,800 in independent auditors' fees in order to collect $613.17 in agency fees. *See* SER 109, 134-36.

Small local unions must be able to pursue grievances and arbitrations, engage in collective bargaining, retain counsel as necessary, and otherwise represent the members of the bargaining unit (union members and agency feepayers alike). Such efforts, this Court has recognized, "entail expenditure of much time and money." *Abood*, 431 U.S. at 221. Having to incur such disproportionate transaction costs to collect an agency fee would significantly undermine the ability of a small local union with a limited budget to fulfill these collective bargaining responsibilities, and would thereby threaten the union's ability to conduct the representational activity that constitutes its reason for being.[5]

Requiring small local unions to obtain audits that cost far more than the amount that they receive from feepayers will

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[5] For similar reasons, the federal government exempts from federal audit requirements entities that spend less than $300,000 per year in federal awards, requiring simply that such entities make records available for review or audit by federal officials. *See* Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35278, 35291 (June 30, 1997).

lead most small unions to forego collection of any agency fee from the nonmembers they represent. This would conflict with this Court's directive that "'the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237).

Compounding the problem, if small unions are required by the transaction costs to forego collecting fees from nonmembers, employees will be encouraged to resign from the union—not for ideological reasons but because they will be able to receive the benefits of union representation without paying *any* amount (rather than the slightly reduced amount that constitutes the agency fee). *See, e.g.*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243-48 (1968). This would conflict with *Abood*'s directive that agency fee doctrine should not encourage free ridership. *See* 431 U.S. at 221-22. In other words, such a ruling could ultimately present small unions with a Hobson's choice between foregoing a substantial percentage of their revenue or undertaking a major accounting expense out of proportion to agency fee revenues, thereby making representation of employees in smaller bargaining units highly impractical.

IV. THE CONFLICT AMONG THE LOWER COURTS ON THIS QUESTION IS SHALLOW AND DOES NOT YET MERIT THIS COURT'S ATTENTION

Petitioners point out that the Third Circuit has reached a different answer to Question Presented II, in a case decided shortly after the Court of Appeals decision at issue in this *certiorari* petition. In *Otto v. Pennsylvania State Educ. Ass'n*, 330 F.3d 125 (3d Cir. 2003), the Third Circuit acknowledged that it was creating a conflict with the Ninth Circuit, but held that "local unions, regardless of their size,

are required to obtain audits of their financial statements." 330 F.3d at 134. While it stated that, if it were "writing on a clean slate," it "might well require something less vigorous for small local unions than independent auditor verification," the court rejected the union's proposed construction of *Hudson* as requiring only large unions to obtain formal audits. *Id.* at 132-33.[6]

Prior to *Otto*, two state courts had considered the same question, reaching opposite results. In *Wareham Educ. Ass'n v. Labor Relations Comm'n*, 713 N.E.2d 363 (Mass. 1999), the Massachusetts Supreme Judicial Court held that "there is no exception to *Hudson*'s audit requirement for small local union affiliates." *Id.* at 89. A few months later, however, an Indiana state appellate court held that a local union with an annual budget of less than $4,000 was not required to subject its financial records to a formal, independent audit. *See Whitley County Teachers Ass'n v. Bauer*, 718 N.E.2d 1181, 1192 (Ind. Ct. App. 1999). The court reasoned that it was not clear that *Hudson* required an audit in such circumstances and that, in fact, *Hudson*'s emphasis on practicality suggested otherwise. *Id.* at 1191-92.

While other courts have interpreted *Hudson* not to require a formal and independent audit in all circumstances,[7] these are

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[6] Petitioners point out that one of the attorneys who represented the unions in this case when it was pending in the lower courts is the same attorney who has filed a *certiorari* petition in *Otto*. Pet. at 23. However, that attorney does not represent the unions in this Court in the instant case.

[7] Other circuits have understood *Hudson*'s requirements to be sufficiently flexible to permit a small local union to make "adequate disclosure" by something short of an independent auditor's verification. *See Thomas v. NLRB*, 213 F.3d 651, 662 (D.C. Cir. 2000) (Edwards, J.) (upholding local union's use of an empirically supported "local presumption" that chargeable portion of local union's expenditures is greater than chargeable portion of parent union's expenditures, as means to fulfill financial disclosure obligation); *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1016-18 (7th Cir. 1988) (Posner, J.)

the only four decisions that directly address the question whether *Hudson* requires an audit regardless of a union's size.[8] The first of these decisions was issued in 1999, 13 years after *Hudson*, and the first Court of Appeals decision to

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(approving system of financial disclosure under which local unions' statements of expenditures were "audited" by lay employees of the parent union). While these cases were decided under the National Labor Relations Act ("NLRA") rather than the First Amendment, both courts explicitly applied the principles announced in *Hudson*. *See Thomas*, 213 F.3d at 658; *Machinists*, 133 F.3d at 1017. *See also Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 393-94 (Wis. 1992) (approving use of empirically supported local presumption and holding that *Hudson* does not require audit of *every* local union's expenditures).

[8] Petitioners assert that "[n]umerous cases" addressing the financial disclosure that unions must provide have "involved small local unions." Pet. at 19 & n.18. However, while some of the cases cited by petitioners quote *Hudson*'s discussion of the need for an independent audit, in none of the decisions did the court actually consider the question whether *Hudson* requires small local unions to obtain formal and independent audits. *See Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 730-31 (7th Cir. 1995) (addressing whether plaintiffs were prevailing parties for attorneys' fees purposes); *Masiello v. U.S. Airways, Inc.*, 113 F.Supp.2d 870, 876-77 (W.D.N.C. 2000) (holding inadequate procedure where nonmembers received no financial information at all before objecting and, after objecting, received information that was illegible, missing key facts, and prepared only after the plaintiffs had been threatened and discharged); *Mitchell v. Los Angeles Unified Sch. Dist.*, 739 F. Supp. 511, 514-15 & n. 7, 516 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992) (holding inadequate procedure by which union management simply estimated percentage chargeable); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986) (determining adequacy of escrow procedures); *McGlumpy v. Fraternal Order of Police*, 633 F. Supp. 1074, 1082 (N.D. Ohio 1986) (holding inadequate union's breakdown of expenses on single sheet of notebook paper, without labeling or indicating amount of non-chargeable expenses or basis for calculations). A number of the foregoing decisions do not even mention the union's size or the complexity of its finances, *see Johnson*, 51 F.3d 726; *Masiello*, 113 F.Supp.2d 870, and one involved a union that represents a bargaining unit of 35,000 employees, *see Mitchell*, 963 F.2d at 259.

resolve the question expressly is the one at issue here. Thus, despite *Hudson*'s age, the split at issue here is very recent and extremely shallow.

Allowing the issue to make its way through the lower courts in other jurisdictions may resolve the split without this Court's intervention or, if this Court ultimately does grant *certiorari* on the question, will inform this Court's consideration with greater development of the relevant factual and legal issues. For example, further development may clarify whether feepayers have been able to obtain the necessary financial information to decide whether to file a challenge without a formal audit, which types of measures short of a formal audit have been employed and how well they have worked, and how small local unions have been affected in jurisdictions where a formal audit is required. This Court will also have the benefit of additional reasoned decisions to review. Given the advantages of waiting, there is no reason for this Court to intervene at this early stage. Instead, this Court should allow the issue to percolate further in the lower federal courts as well as the state courts, and address it if and when the conflict persists after a greater number of courts have considered the issue.[9]

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[9] That the split depends in part upon the interpretation of a Supreme Court case is hardly unique and does not mean that percolation of the issue would be any less useful in informing this Court's ultimate consideration. If this Court were to grant *certiorari* to address this issue, it would not be bound by the footnote in *Hudson*, which was not essential to the Court's holding since the CTU's notice was invalidated for other reasons. *See Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) ("[T]his Court is bound by holdings, not language"); *Tyler v. Cain*, 533 U.S. 656, 663 n.4 (2001) (dictum, which is not necessary to the final disposition of a case, is not binding). Thus, additional decisions which flesh out the implications of imposing a formal audit requirement on small local unions would be useful in informing this Court's consideration. Moreover, a consensus in the lower federal and state courts may emerge regarding the construction of the footnote at issue in *Hudson*, obviating

V. THE ISSUE IS NOT SUFFICIENTLY IMPORTANT TO MERIT THIS COURT'S ATTENTION

The parties to this case have not disputed the notion that large local unions, which have more extensive budgets and more complicated finances than a union such as DTA, must provide nonmembers with financial information that has been verified by a formal audit. In fact, seven of the eight local union defendants did not appeal the district court's holding that they were required to provide audited financial statements as part of their *Hudson* notices.

Thus, the issue raised by Question Presented II will have significance only for small local unions. And the significance of the issue is even further diminished by the fact that it does not arise in many states at all, because no agency fee is collected from nonmembers of a public sector union where (a) public employees lack the right to unionize and engage in collective bargaining, or (b) unions do not have the statutory right to collect mandatory fees from non-union members.[10] Only 23 of the 50 states have passed comprehensive public sector labor relations laws; an additional 13 have passed laws granting more limited collective bargaining rights. *See* AFL-CIO PUBLIC EMPLOYEE DEPARTMENT, PUBLIC EMPLOYEES BARGAIN FOR EXCELLENCE: A COMPENDIUM OF STATE PUBLIC SECTOR LABOR RELATIONS LAWS at 1 (1997). Of these 36 states which allow at least *some* unionization by public employees, ten do not allow unions to collect mandatory fees from nonmembers. *See id.* at 8-66; *see also* ARIZ. CONST., ART. XXV; ARIZ. REV. STAT. §23-1301 et seq.; ARK. CONST. AMENDMENT 54; ARK. CODE §11-3-301 et seq.;

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the need for this Court's review.

[10] When fees are collected from employees of a private employer, no constitutional issue is presented, but the NLRA similarly restricts the purposes for which a nonmember's fee may be spent. *See Air Line Pilots Ass'n*, 523 U.S. at 868.

FLA. CONST., ART. I, §6; FLA. STAT. §447.17; IDAHO CODE §44-2001 et seq.; IOWA CODE §731.1 et seq.; KAN. CONST., ART. 15, §12; KAN. STAT. ANN. §44-831; NEB. CONST., ART. XV, §§13-15; NEB. STAT. §48-217 et seq.; NEV. STAT. §613.230 et seq.; OKLA. CONST., ART. XXIII; S.D. CONST., ART. VI, §212; S.D. LAWS §60-8-3 et seq. Thus, the question whether smaller local unions must obtain formal audits in order to collect fees from nonmembers could not even arise in half of the fifty states.

Finally, besides the small number of feepayers that will be affected, the amount at stake is extremely minor. In the instant case, the amount of the agency fee is less than $90 per feepayer, and the amount reasonably in dispute is a tiny fraction of that amount. SER 109. In *Otto*, the annual fee amount was $45. The stakes for feepayers are extremely low, and do not justify this Court's premature acceptance of *certiorari* on an issue, the consideration of which would be better served by further development in the lower courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 03-89

IN THE

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KIM SHEFFIELD, *et al.*,
Petitioners,

v.

LARRY ACEVES, in His Capacity as Superintendent, Franklin McKinley Elementary School District, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPERINTENDENT RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

We do not take issue with the facts stated in Petitioners' Statement of the Case (Pet. at 2-6), although we disagree with the characterizations and legal conclusions intertwined therein.

REASONS FOR DENYING THE WRIT

The first question presented in the Petition is, in the words of baseball immortal Yogi Berra, "like *deja vu* all over again." The Petition marks the fourth time in the last year and a half that attorneys from the National Right to Work Foundation, Inc., have requested this Court to grant a writ of *certiorari* on the issue raised by that question. Each of the past three times, the Court has declined to do so. *See Foster v. Garcy*, 535 U.S. 1112 (2002); *Prescott v. County of El Dorado*, __ U.S. __, 123 S. Ct. 1251 (2003); *Cummings v. Connell*, __ U.S. __, 123 S. Ct. 2577 (2003). The pending Petition raises no new argument as to the first question that has not already been considered and rejected by the Court. There is simply nothing new this time, and the Court should deny *certiorari* on the issue raised by the first question for the same reasons that it has done so in the prior three cases.

The second question presented in the Petition raises no important issue which requires the attention of this Court, and for that reason *certiorari* should be denied as to that question as well. To avoid unnecessary duplication, the Superintendent Respondents join in, adopt and incorporate herein by reference the arguments presented as to that question by the Union Respondents in their Opposition to the Petition. The Superintendent Respondents merely add that if the Court nonetheless grants *certiorari* as to the second question presented, it should *not* grant *certiorari* as to the first question.

I. THIS COURT SHOULD DENY THE PETITION FOR THE SAME REASONS THAT IT RECENTLY DID SO IN THE *FOSTER, PRESCOTT* AND *CUMMINGS* CASES, WITH REGARD TO THE ISSUE OF PUBLIC EMPLOYER LIABILITY

In its first question presented, the Petition seeks *certiorari* as to issue of the liability of public officials for collecting fair

share fees where the union's *Hudson* notice is legally deficient. Pet. at i. Three times in the past year and a half, staff attorneys at the National Right to Work Foundation, Inc., including the same attorney who represents Petitioners in the pending case, Mark J. Beutler, have attempted to convince the Court to grant *certiorari* as to that issue (sometimes expressly and sometimes implicitly as part of a question regarding the legality of fair share fee indemnification agreements and fee payers' standing to challenge such agreements). Three times this Court has declined to do so, most recently just three months ago. *See Foster v. Garcy*, 535 U.S. 1112 (2002); *Prescott v. County of El Dorado*, __ U.S. __, 123 S. Ct. 1251 (2003); *Cummings v. Connell*, __ U.S. __, 123 S. Ct. 2577 (2003).[1] In the present case, as in *Prescott* and *Cummings*, the court of appeals applied the rule regarding public employer liability stated in its earlier decision in *Foster v. Mahdesian*, 268 F.3d 689 (9th Cir. 2001), as to which this Court denied *certiorari* in *Foster v. Garcy*, 535 U.S. 1112. *See* Pet. App. A at 7a, 11a-12; *Cummings v. Connell*, 316 F.3d 886, 896-97 (9th Cir. 2003); *Prescott v. County of El Dorado*, 298 F.3d 844, 846 (9th Cir. 2002).

Nothing has changed since this Court denied the petitions raising this same issue in *Foster*, *Prescott* and *Cummings* just eighteen, seven and two months ago, respectively. Virtually all of the arguments presented in the current Petition as to the issue of public employer liability were presented in the *Foster* petition, often in *haec verba*, and many of them have been repeated in the *Prescott* and *Cummings* petitions. The only argument on that issue that was not presented in the *Foster* petition was that based upon the Tenth Circuit's decision in *Wessel v. City of Albuquerque*, 299 F.2d 1186 (10th Cir.

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[1] *Foster* was Case No. 01-1307, and *certiorari* was denied on June 3, 2002. *Prescott* was Case No. 02-686, and *certiorari* was denied on February 24, 2003. *Cummings* was Case No. 02-1493, and *certiorari* was denied on June 16, 2003.

2002). *See* Pet. at 12. *Wessel* was briefed, however, in both the *Prescott* and the *Cummings* petitions, which were denied by the Court. The Court has therefore already considered and denied *certiorari* on all of the arguments presented in the Petition. Rather than burden the Court with identical briefing of the reasons *certiorari* is not warranted, the Superintendent Respondents refer the Court to the Oppositions in the three previous cases and respectfully request it to deny the Petition in the present case as to the first question for the same reasons that it denied the similar petitions in *Foster*, *Prescott* and *Cummings*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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September 2003

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MISCELLANEOUS

Robert L. Stern, *et al.*, *Supreme Court Practice*
(8th ed. 2002) 1, 9

Sup. Ct. R. 10(a) 1

U.S. Const. amend. I 2, 4, 5, 8

I. Issue I: Employer Liability—This Court's prior denial of *certiorari* on similar issues has no precedential value.

On the issue of public employer liability, neither the Respondent Superintendents nor the Respondent Unions offer any reason why this Court should deny *certiorari* other than that this Court has denied *certiorari* in the past.

Denial of *certiorari* indicates nothing about the underlying issues.[1] Many cases are granted review after other petitions presenting similar issues have been denied. In *Chicago Teachers Union v. Hudson* itself, this Court granted review only after the Court declined to review three cases presenting an identical issue. *See* 475 U.S. 292, 300 n.7 (1986). That the same issue returns to the Court suggests that the courts of appeals are unable to resolve the conflict among them, is a criterion that favors a grant of *certiorari*. *See* Sup. Ct. R. 10(a).

II. Issue II: Verification by Independent Auditor.

A. The issue for which review is sought is of sufficient importance to warrant this Court's review.

The Unions contend that whether this Court's requirement of verification by independent auditor applies to all unions that compel nonmembers to subsidize their activities "is not an important legal issue."[2] The appellate attorney who represented the Unions before the Ninth Circuit in this case made the opposite assertion to this Court in *Otto v. Pennsylvania State Educ. Ass'n,* 330 F.3d 125 (3d Cir. 2003), *petition for cert. filed*

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[1]*See* Robert L. Stern, *et al.*, *Supreme Court Practice* [hereinafter "Stern"], ¶ 5.7, pp. 306-11 (8th ed. 2002).

[2]Union Respondents' Opposition to Petition for Writ of Certiorari [hereinafter "Unions' Opp."] at 3.

sub nom. Shaler Educ. Ass'n v. Emory, No. 03-182 (docketed Aug. 1, 2003):

> Literally thousands of small local unions are seriously impacted by the decision of the Court below—either because they are directly bound by the Third Circuit's decision [in *Otto*], or because of the chilling effect that flows from the legal uncertainty engendered by the conflicting decisions of the Third and Ninth Circuits. It is urgent that this Court resolve that legal uncertainty by granting review to clarify *Hudson*'s disclosure requirements as applied to small local unions . . . ."

Otto Pet. at 21.

The Unions contend that "the amount at stake is extremely minor." Unions' Opp. at 18. From their perspective this is true. The Unions' interests are purely economic and the proportion of their revenues derived from nonmembers' agency fees is inconsequential. But from the fee payers' perspective, at issue are the first amendment rights of many thousands of nonunion employees whose rights are compromised by the Ninth Circuit's decision in this case. *Cf. Hudson*, 475 U.S. at 305 ("The amount at stake for each individual dissenter does not diminish the [First Amendment] concern.").

In addition, the Unions ignore the non-monetary costs now imposed on fee payers to verify the union's finances. As a result of the Ninth Circuit's ruling, each nonunion employee must now independently verify the union's expenditures—essentially duplicating one another's work—in order to obtain some assurance that the information received is reliable.[3]

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[3] *See* R. 82, Decl. of Irving B. Ross, CPA., at 18, ¶ 49:

(continued...)

B. The Ninth Circuit's decision was wrong.

1. Independent verification prevents excessive collections through third-party review.

The Unions contend that requiring the local unions to obtain an independent audit "would serve no discernible purpose." Unions' Opp. at 9. The Unions misstate the purpose of the independent verification requirement. The independent auditor provides assurance that the union spent the money the way it claims to have spent the money.[4] *Otto*, 330 F.3d at 130; *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 813 (9th Cir. 1997).

More important, the verified financial disclosure is issued contemporaneous with the commencement of involuntary agency fee withholding. *Hudson* held that the amount which

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[3](...continued)
By lifting from themselves the burden of establishing that their finances are trustworthy, the unions are simply enlarging that same burden and then transferring it to nonunion teachers. After this burden is enlarged and transferred to teachers, it is then multiplied. Permitting each nonunion teacher . . . to separately examine the union's accounting records would cause a potentially enormous disruption in the union's business.

[4]The Unions also contend that the verification requirement is unimportant because the real test of the union's chargeable agency fee occurs in the challenge proceedings before the independent fact finder. But under the CTA's procedures, a local union generally is not required to, and the DTA specifically did not, present any evidence of its own expenditures at the fact finding. The local unions relied upon the "local union presumption," *i.e.*, the local unions' ratios of chargeable and nonchargeable expenditures are presumed to be no less than that of the CTA. *See* Pet. App. at 42a-44a.

can initially be taken from nonunion employees' wages cannot be left completely to union officers. The problem in *Hudson* was that the entire agency fee collection procedures were in the union's hands.[5] In this case, as in *Hudson*, there was no pre-seizure external safeguard against excessive collection because the financial disclosure was solely the representation of union personnel. *See* Pet. App. at 41a, ¶ 9.

That is where the independent auditor verification fits into the *Hudson* equation. The independent auditor is required by first amendment due process,[6] because the auditor provides a neutral third-party protection from excessive and unlawful initial collection. The Unions' argument ignores this critical function the external audit required by *Hudson*.

Government cannot garnish or withhold money from wages to satisfy a debt to a labor union unless a pre-seizure hearing is provided or a neutral magistrate determines that the forced withholding is lawful.[7] By excising the "independent auditor" from *Hudson*'s rule, the Ninth Circuit eliminated the only pre-collection external control required by due process.[8]

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[5]475 U.S. at 308 ("the most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees") (citation and internal quotation omitted).

[6]*Hudson* held that the requirements of due process were subsumed within its first amendment holding. 475 U.S. at 304 n.13.

[7]*See, e.g.*, *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969) ("absent notice and a prior hearing . . . prejudgment garnishment . . . violates the fundamental principle of due process").

[8]The Ninth Circuit not only eliminated the "independent auditor" (continued...)

2. The Ninth Circuit's vague standard frustrates *Hudson* compliance.

Before the Ninth Circuit's decision in this case, *Hudson* provided a clear legal standard. Unions had to provide independently verified financial information to those from whom it demanded subsidy. The Ninth Circuit's new legal standard is no standard at all. What the Ninth Circuit requires is "flexible and creative 'auditor verifiable methodolog[ies]' appropriately tailored to provide . . . a reasonable opportunity for meaningful verification, without depleting the union's coffers . . . [that] is sufficiently reliable to ensure that a nonmember can independently verify that the union spent its money where it claimed that it did." Pet. App. at 11a.

The Ninth Circuit's new rule of law renders *Hudson* virtually unenforceable. Without the clearly defined legal standard set forth in *Hudson*, nonmembers can never know whether the financial disclosure and related verification is what

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[8](...continued)
requirement, as the *Otto* Court recognized, 330 F.3d at 132, but also approved the precise procedure this Court held failed to "provide an adequate explanation for the advance reduction of dues," *Hudson*, 475 U.S. at 309.

In *Hudson*, the union had invited Ms. Hudson to review the union's financial records. Nonetheless, this Court held that a union must provide "an adequate explanation of the basis of the fee," *id.* at 310, and that "adequate disclosure surely would include verification by an independent auditor." *Id.* at 307 n.18. The appropriately justified advance reduction . . . [is] necessary to minimize both the impingement [on nonmembers' First "Amendment interests] and the burden." *Id.* "The nonmembers 'burden' is simply the obligation to make his objections known." *Id.* at 306 n.16.

they are due.[9] Accordingly, the risks of litigation for any agency fee payer are simply too great given the limited amount at stake.

3. The Unions' contentions regarding the economic burden of compliance with *Hudson*'s requirements are superficial.

The Unions contend that the verification requirement presents an undue economic burden because the auditor's fee exceeds the amount of agency fees collected. They simultaneously speculate that a union's decision to forego an audit and the concomitant inability to collect agency fees will result in a mass exodus from the union.[10] However, as the Unions concede, Unions' Opp. at 6-7 n.2, the local union's portion of the agency fee is a small component of the total agency fee, insufficient to motivate members to resign.

Moreover, it is analytically unsound to consider the economic wherewithal of only the local union when assessing the economic burden of complying with *Hudson*'s requirements. Local teachers unions are a part of a three-level organization that includes the CTA and the NEA. The local union collects revenues not only for itself but also for the CTA and NEA. The

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[9]The Unions do not know either, but they will just take the money and see if someone complains, and, if forced to, stop taking money from that individual, but continue taking it from everyone else. The Ninth Circuit's new rule is a formula for continued resistance to this Court's mandate in *Hudson*.

[10]The two contentions are inconsistent. A substantial increase in the number of nonmembers will affect the cost-benefit equation as to whether to retain the services of an independent auditor. The problem that the Unions fear, is self-correcting.

local union, in turn, delegates to these affiliates a substantial portion of its bargaining agent statutory obligations.

For each bargaining unit member, the local sends annually to the CTA and the NEA $530,[11] while the local retains between $5 and $299, with most locals retaining approximately $125.[12] If nonmembers must subsidize the CTA's and NEA's treasuries, it is only fair that the local union tap those same resources to discharge the constitutional obligations incident to exacting these agency fees. *See Otto*, 330 F.3d at 135. This Court permits local unions to charge nonunion employees for activities that benefit other bargaining units represented by affiliated local unions on the rationale that "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable *economic*, political, and informational resources ***when the local is in need of them***." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991) (emphasis added).

Verification by independent auditor is the price unions must pay for the extraordinary privilege (enforced by the government) of taking money from those who do not wish to join their cause. Fairness requires that, as a precondition to the seizure of agency fees, unions provide independently verified disclosure of how they use that money. "Indeed, the union triggers no disclosure [or audit] requirement until it voluntarily seeks to collect service fees from the non-union members." *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 n.2 (6th Cir. 1987).

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[11]*See* R. 59, Decl. of Stephanie Minkin, at 2 (CTA takes $416 and NEA takes $114 for each individual represented by a local).

[12]*See* R. 64, Decl. of Loretta Doon.

C. The Ninth Circuit's decision conflicts with this Court's decision in *Hudson*.

The *Hudson* Court balanced the statutory rights of labor unions with nonmembers' constitutional rights by requiring audited financial disclosure and other procedural safeguards as a condition of agency fee collection. The Court noted that "'[b]y allowing the union shop at all, we have already countenanced a significant impingement on [the nonmembers'] First Amendment rights.'" 475 U.S. at 301 n.8 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). Verification by independent auditor is necessary to balance the equation. The Ninth Circuit disturbed that careful balance and, essentially, placed the union's economic concerns on the scale twice: once to permit agency shop, and a second time to reduce the procedural safeguards required to protect nonmembers' first amendment rights.

1. The Ninth Circuit reallocated the burden of expense verification from the union to the nonmember in contravention of *Hudson*.

Neither the Unions in this case nor the NEA-affiliated union counterparts in *Otto* dispute the central rationale underpinning the Third Circuit's rejection of the Ninth Circuit's holding in this case. *Hudson* placed the burden of expense verification on the union, not the nonmember. *See Hudson*, 475 U.S. at 306 & n.16 ("The nonmember's burden is simply the obligation to make his objection known."). However, the Ninth Circuit here "shifted the burden of expense verification from the union to the nonmember." *Otto*, 330 F.3d at 131.

2. *Hudson*'s independent verification requirement applies to all unions, not just the union in *Hudson*.

The Unions suggest (Unions' Opp. at 6) that *Hudson*'s unambiguous mandate was directed only to the union defendant in that case. The Unions base this extraordinary position on the *Hudson* Court's use of the word "union" with a capital "U" in footnote 18.[13] However, the Court used the capital "U" throughout *Hudson*. Thus, the Unions' logic would require that all of the procedural requirements set forth in *Hudson* apply only to the union defendant in that case.

The Court rarely grants *certiorari* or writes opinions on legal issues that are of interest only to the litigants before it. *See* Stern, § 4.11 at 244. Not only did the *Hudson* Court say nothing to suggest that its holding was limited to the union in that case, but the Court indicated that it granted *certiorari* to address "the divergent approaches of other courts to the issue" in cases involving other unions. 475 U.S. at 300 n.7. The *Hudson* Court, thus, was cognizant that in announcing the audit requirement it was stating a generally applicable rule.[14]

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[13]Contrary to the Unions' suggestion, the Court's discussion of the independent auditor's role is not limited to note 18. In discussing the escrow requirement, *Hudson* uses the terms "verification" and "audit" interchangeably, *see, e.g.*, 475 U.S. at 310 n.22, and indicates that the verification is to be performed by a certified public accountant, *id.*

[14]The unions further contend that, because the union's notice at issue in *Hudson* contained constitutional defects in addition to its failure to provide verification by independent auditor, the Court's holding as to the independent auditor requirement is mere dictum and

(continued...)

3. No further development on this legal issue is foreseeable.

Contrary to the Unions' assertion (Unions' Opp. at 16 & n.9), there is no reason for the Court to await development of a judicial consensus before it exercises its jurisdiction. Until the Ninth Circuit's decision in this case, the consensus had already developed that this Court meant what it said when it required independent verification.

In every prior public-sector case litigated in federal court, the court rejected the union's attempt to satisfy its *Hudson* obligations with something other than financial information verified by independent auditor. *See* cases cited Pet. at 18-19. All that remains to be decided in the circuits which have not yet addressed this issue is whether to follow the Third or Ninth Circuits. Judicial adoption of either precedent will add nothing to the development of the underlying issue, which should be resolved now. Because this case and *Otto (filed sub nom. Shaler Educ. Ass'n v. Emory)*, No. 03-182 present the same issue, the Court should conference the two cases together and grant *certiorari* in both.

Respectfully submitted,

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September 2003

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[14](...continued)
can be disregarded. Unions' Opp. at 16 n.9. This is a ***non sequitur***. The independent auditor requirement was part of *Hudson*'s holding explaining the union's failure to meet its disclosure obligations incident to agency fee withholding. *See* 475 U.S. at 306-07 & n.18. No court decision even hints that this language is dictum.